IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 309

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Petitioners,*

v.

JOSEPH CARROLL, ET AL., *Respondents.*

No. 310

JOSEPH CARROLL, ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX

Relevant Docket Entries

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

60 Civil 2939

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, ORCHESTRA LEADERS OF GREATER NEW YORK,

Plaintiffs,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said FEDERATION, STANLEY BALLARD, as Secretary of said FEDERATION, and GEORGE V. CLANCY, as Treasurer of said FEDERATION, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of LOCAL 802, MAX L. ARONS, as Secretary of LOCAL 802, and HI JAFFE, as Treasurer of LOCAL 802,

Defendants.

60 Civil 4926

[Same caption as in 60 Civil 2939]

July 27, 1960—60 Civil 2939, filed complaint and issued summons.

November 10, 1960—60 Civil 2939, filed answer of defendants.

December 15, 1960—60 Civil 4926, filed complaint and issued summons.

February 21, 1961—60 Civil 4926, filed answer of defendant Associated Musicians of Greater New York to the complaint.

May 12, 1961—60 Civil 4926, filed answer of defendant American Federation of Musicians to the complaint.

May 22, 1961—60 Civil 2939 and 60 Civil 4926 consolidated by order of Ryan, J.

June 12, 1963—Filed plaintiffs' proposed agreed statement of facts.

September 18, 1963—Filed defendant Local 802's answer to request for admissions.

August 14, 1964—Filed pre-trial order of Levet, J. Consented to.

May 18, 1965—Filed findings of fact and opinion of Levet, J.

May 25, 1965—Filed judgment of Levet, J., dismissing actions on their merits.

June 2, 1965—Filed plaintiffs' notice of appeal.

January 30, 1967—Filed opinion and judgment of Court of Appeals.

October 16, 1967—Filed certified copy of order of Supreme Court granting certiorari.

Complaint in 60 Civil 2939

(Tr. pp. 1577-2123)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, ORCHESTRA LEADERS OF GREATER NEW YORK,

Plaintiffs,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said FEDERATION, STANLEY BALLARD, as Secretary of said FEDERATION, and GEORGE V. CLANCY, as Treasurer of said FEDERATION, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of LOCAL 802, MAX L. ARONS, as Secretary of LOCAL 802, and HI JAFFE, as Treasurer of LOCAL 802,

Defendants.

Plaintiffs, by SCHMIDT & MCDONALD, their attorneys, for their complaint, allege:

1. This action arises under the laws of the United States, specifically the Sherman and Clayton Anti-Trust Acts (15 U. S. Code, sections 1, 2, 15 and 26); and under the laws of the State of New York, specifically, section 340 of the General Business Law of the State of New York; and under the common law of the State of New York.

2. Plaintiffs, JOSEPH CARROLL and CHARLES PETERSON are orchestra leaders and are, also, members in good standing of LOCAL 802 ASSOCIATED MUSICIANS OF GREATER NEW YORK (hereinafter referred to as LOCAL 802 and of defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED

STATES AND CANADA). Their business addresses are respectively: 174 East 74th Street, New York 21, N.Y., and 110 West 34th Street, New York 1, N. Y.

3. Plaintiff, ORCHESTRA LEADERS OF GREATER NEW YORK, is an unincorporated association within the meaning of the General Associations Law of the State of New York. Its membership comprises of more than ten orchestra leaders, all of whom are members of defendant unions and some of whom belong to other Locals affiliated with the AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA. Its office is located at 174 East 74th Street, New York, N. Y.

4. Plaintiffs, CHARLES TURECAMO and JOSEPH CARROLL, are the Treasurer and the Secretary, respectively, of ORCHESTRA LEADERS OF GREATER NEW YORK.

5. DEFENDANT, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, (hereinafter called INTERNATIONAL ORGANIZATION) is (with the qualification alleged below) a labor union or labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959. It is affiliated with the AFL-CIO and its principal office is located at 425 Park Avenue, New York 22, N. Y. It is an international union, comprising numerous local unions, one of which is defendant LOCAL 802.

6. Defendant, LOCAL 802, is (with the qualification alleged below) a labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959; it is affiliated with (a) the AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, as one of its locals and (b) the AFL-CIO. Its principal office is located at 26 West 52nd Street, New York 19, N. Y.

7. The various locals affiliated with defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, have their principal offices in various States of the

United States and in Canada, and their membership exceeds a total of 260,000 orchestra leaders and sidemen in practically every State of the United States, in Canada, in Puerto Rico, and in the Virgin Isles.

8. Defendant, HERMAN D. KENIN is, and for some time past has been, president of the INTERNATIONAL ORGANIZATION.

9. Defendant, STANLEY BALLARD is, and for some time past has been, SECRETARY OF THE INTERNATIONAL ORGANIZATION.

10. Defendant, GEORGE V. CLANCY is, and for some time past has been TREASURER OF THE INTERNATIONAL ORGANIZATION.

11. Defendant, AL MANUTI is, and for some time past has been, President of LOCAL 802.

12. Defendant, MAX L. ARONS is, and for some time past has been, Secretary of LOCAL 802.

13. Defendant, HI JAFFE, is and for some time past has been, Treasurer of LOCAL 802.

14. Annexed hereto, marked *"Exhibit A"*, to form part of this complaint is a copy of the CONSTITUTION, BY-LAWS AND POLICY of the defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA. Though dated "1959", it is the current Constitution and By-laws of that INTERNATIONAL ORGANIZATION.

15. Annexed hereto, marked *"Exhibit B"*, to form part of this complaint is a copy of the current CONSTITUTION AND BY-LAWS of defendant, LOCAL 802, revised as of October 5, 1959.

16. Annexed hereto, marked *"Exhibit C"*, to form part of this complaint is a copy of the official "PRICE LIST GOVERNING SINGLE AND STEADY ENGAGEMENTS" of defendant, LOCAL 802, revised as of June 1, 1959.

17. Annexed hereto, marked *"Exhibit D"*, to form part of this complaint is a copy of the official "SINGLE ENGAGEMENT MINIMUMS" of defendant, LOCAL 802, revised as of June 1, 1959.

18. Annexed hereto, marked *"Exhibit E"*, to form part of this complaint is a copy of the official "WAGE SCALES, RULES AND REGULATIONS GOVERNING STEAMSHIPS" published by defendant, LOCAL 802.

19. Annexed hereto, marked *"Exhibit F"*, to form part of this complaint is a copy of the official "BY-LAWS AFFECTING TRAVELING MEMBERS IN EFFECT SEPTEMBER 15, 1954", published by defendant, INTERNATIONAL ORGANIZATION.

20. Annexed hereto, marked *"Exhibit G"*, to form part of this complaint is a copy of a notice appearing in ALLEGRO (issue of June, 1960) by which defendants established "New Minimums" supplementing or revising *"Exhibit D"*, *supra.*

21. LOCAL 802, regularly publishes an official, printed magazine entitled "ALLEGRO", which is issued monthly.

22. Annexed hereto, marked *"Exhibit A"*, to form part of this complaint are some pages of the issue of ALLEGRO dated May, 1960. These pages reprint, in full, an announcement of a change (by way of increase of rates) of the PRICE LIST GOVERNING SINGLE AND STEADY ENGAGEMENTS (*"Exhibit C"*).

23. Plaintiffs bring this action for themselves and for all members (so numerous as to make it impractical to bring them all before the Court) of LOCAL 802 and of the INTERNATIONAL ORGANIZATION who are similarly situated; and this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class; and this class action is authorized by Rule 23 of the Federal Rules of Civil Procedure.

24. Plaintiffs and the class they represent, are: (a) employers who regularly employ sidemen or employee musicians who are members of the INTERNATIONAL ORGANIZATION, OF LOCAL 802 and of other locals affiliated with the INTERNATIONAL ORGANIZATION; and (b) independent contractors who are largely engaged in the single engagement field; i.e., they are hired *ad hoc* by clients to furnish musical services for weddings, banquets, dances and other occasions which are not steady engagements. The distinction between single engagements and steady engagements is set forth in the CONSTITUTION AND BY-LAWS OF LOCAL 802 (*"Exhibit B"*) and in the PRICE LIST GOVERNING SINGLE AND STEADY ENGAGEMENTS OF LOCAL 802 (*"Exhibit C"*).

25. Defendant, LOCAL 802, has a membership of some thirty thousand (30,000) members, including plaintiffs and the class they represent.

26. Plaintiffs, and the class they represent as employers and independent contractors, frequently fulfill single engagements outside of the State in which they usually operate and in which their principal offices are located. Plaintiffs and the class they represent gross millions of dollars of income per year from such engagements in various states of the United States in connection with which they render musical services outside of the State in which they usually operate or in which their principal offices are located. Many of the purchasers of such musical services (the clients whom plaintiffs and the class they represent serve) are large companies engaged in interstate or foreign commerce. Many of the sidemen or musicians employed by plaintiffs and the class they represent derive, each year, hundreds of thousands of dollars from rendering their musical services in various states of the United States outside of the State in which they reside or in which they usually render such musical services.

27. Plaintiffs, as independent contractors and employers, operate their several businesses independently; have

their own usual and occasional clientele, employ their sidemen or musicians for each particular occasion, direct such musicians themselves *or* assign directors for them, control or discipline such employees, conduct all negotiations leading to engagements, regulate the style and manner of performance by their orchestras during such engagements and regularly and necessarily employ sidemen and musicians to assist them in carrying out their engagements which they cannot fulfill without such assistance. The named plaintiffs commonly provide such musical services regularly in New York, New Jersey, Connecticut and Pennsylvania as well as in other states.

28. Defendants, as a matter of long standing practice and policy, have insisted and do insist that orchestra leaders, especially those engaged in the single engagement field, shall become and remain members in good standing of the local unions affiliated with defendant, INTERNATIONAL ORGANIZATIONS.

29. Such insistence has been enforced from time to time by strikes, boycotts, picketing and other concerted action or by threat of such action; and the threat of such action affects the inter-state and intra-state business involvement of the plaintiffs and the class they represent and of their employees or sidemen.

30. One of the methods used by defendants to enforce their prices and minimums (as set forth in Exhibit C, D, E, F and G) is illustrated by the copy of a typical page taken from ALLEGRO (issue of June, 1960, page 28), hereto annexed marked *"Exhibit I"* to form part of this complaint. This notice typically calls for concerted action in visiting economic and other reprisals upon employers or members who fail to comply with the prices and minimums fixed by defendants. While such contract forms use highly artificial and dissembling language to misrepresent the true relationship between orchestra leaders and sidemen, they clearly reveal defendants' policy and practice of in-

sisting on prices and minimums established by defendants for employers and employees alike in the performance of musical services.

31. Defendant labor organizations are undoubtedly labor unions or labor organizations within the meaning of State and Federal laws governing labor relations when they purport to act on behalf of employees in collective bargaining; but when they purport to act on behalf of any combination, arrangement or conspiracy between certain employers and themselves, they do not act as labor unions or labor organizations; and it is impossible for said defendant unions simultaneously and without conflict of interest to represent plaintiffs and the class they represent (employer orchestra leaders) on the one hand and the employees of such orchestra leaders on the other hand.

32. Defendants insist upon the use of certain forms of contract wherever musicians are employed in the United States. Hereto annexed, marked *"Exhibits J and K"* respectively, are typical examples of such forms of contract required by defendants.

33. *"Exhibits A and B"* annexed to this complaint constituted contracts (or purported contracts where membership is not free but coerced) obligating plaintiffs and the class they represent as well as defendants and also all musicians at any time employed by plaintiffs and the class they represent. However, such contracts or purported contracts are in most cases not willingly assumed by employing orchestra leaders because many of them have been coerced into membership in defendant unions upon the basis of boycotts, strikes, picketing and other forms of concerted economic pressure or reprisal or upon the basis of threat of such pressure or reprisal.

34. Some orchestra leaders, including plaintiffs, have refused to comply with the impositions upon employers and employees made by defendants in the form of price lists and minimums and amendment thereof; while other orches-

tra leaders cooperate with defendants in fulfilling such price lists and minimums.

35. Defendants implement their monopoly of power by imposing at times upon the plaintiffs and the class they represent the equivalent of the obligations of a labor contract without ever indulging in collective bargaining; they also impose upon plaintiffs and the class they represent the aforesaid price lists and minimums without bargaining or agreement of any kind; they depend upon their monopoly position from which they control employee and employer musicians, for the purpose of inducing or coercing willing or unwilling, cooperation from orchestra leaders in applying the minimums and the prices aforesaid.

36. Defendants, in combination or cooperation with certain orchestra leaders, have arranged and are presently arranging or conspiring to fix prices for musical services in the United States by requiring plaintiffs and the class they represent to agree to the minimums and prices aforesaid.

37. The typical agreements exacted by defendants from all orchestra leaders as employers or independent contractors incorporate all of the restrictive practices and features herein complained of.

38. Defendants have in purpose or effect monopolized and are attempting to monopolize by the aforesaid arrangements and combination the marketing and sale of musical services throughout the United States and especially in the Greater New York area; and they have restrained, and have been and are engaged in a combination and conspiracy to restrain competition in the marketing of such musical services and to restrain trade and commerce among the several states all in violation of the Sherman Anti-Trust Act (15 U. S. Code Sections 1 and 2); and defendants' activities also constitute a violation of section 340 of the General Business Law of the State of New York.

39. The regulations aforsaid (especially the price list and minimums made and promulgated by defendants) con-

stitute a contract, combination or conspiracy in restraint of trade or commerce among the several states, because defendants collaborate with and exact compliance from a significant number of orchestra leaders who employ musicians and sidemen and who willingly comply with defendants' said regulations.

40. Defendants by said price list and minimum list and by their policy and practice as herein set forth restrict competition by unlawful restraints of trade and engage in unfair methods of competition.

41. The purpose or effect of defendants by their aforesaid policy and practice and by the said regulations is to eliminate or destroy competition or competitive business from the single and steady engagement field and to unduly and unreasonably restrict in that field the freedom of plaintiffs and those similarly situated to enter into normal business contracts or to fulfill them by access to the labor market.

42. The purpose or effect of defendants aforesaid policy and practice, as well as their price and minimum lists, is to impose restraints upon commerce within the State of New York which have a significant impact and influence upon commerce between the several states; and such appreciable local contractual and other restraints upon commerce exert in turn a substantial influence or effect upon commerce between the states.

43. The purpose or effect of defendants' aforesaid policy and practice, as well as of the aforesaid price and minimums lists, is solely to control prices in the single and steady engagement field.

44. The purpose or effect of defendants' aforesaid policy and practice and of said minimums and price lists is to foreclose access to a free market in musical services and to effectuate, within defendant unions and the circle of co-

operating orchestra leaders or employers a monopoly controlling, on a national basis, the market for musical services.

45. By their aforesaid price and minimums lists, defendants fix prices of all or most musical services coming within the stream of interstate commerce.

46. The purpose or effect of defendants by the aforesaid policy, practice and lists is to boycott all third parties or to visit upon them other economic reprisals unless they fall into line with defendants' aforesaid contract, combination, conspiracy or arrangement in restraint of trade.

47. The purpose or effect of the aforesaid policy, practice and lists of defendants is to cause an unnatural increase in the general level of prices for musical services within the area of interstate commerce and to exclude other competitors from the market for such musical services; and to effect bankruptcy or serious financial loss to orchestra leaders who, like plaintiffs and the class they represent, refuse to comply with the aforesaid policy, practice and lists of defendants.

48. Defendants have also formed a common law conspiracy to commit the above mentioned acts and torts against plaintiffs and the class they represent and in violation of law have conspired to interfere, and have in fact interfered, with reciprocal relationships between plaintiffs and the class they represent on the one hand and the clients who retain said plaintiffs and said class as independent contractors on the other hand.

49. Insofar as defendant labor organization do and have done are continuing to do the aforesaid things and commit the aforesaid acts and torts, they are not *bona fide* labor organizations within the meaning of state and federal labor relations laws and they cannot properly avail themselves of any statutory privileges and immunities enjoyed by genuine labor organizations.

50. Defendants by the arrangements or conspiracy aforesaid have entered into a plan and scheme the purpose or

effect of which is to completely control the employment of employee musicians and their availability to plaintiffs and to the class they represent, and also to control the marketing and price of all musical services in the States of the United States and in Canada; and in carrying said plan and scheme into effect they have persuaded, induced and in some instances coerced orchestra leaders in several States of the United States to join defendants under agreements that as members of defendant organizations, they will not make musical services available to anyone who does not enter into agreements to comply with the aforesaid price and minimums lists.

51. In carrying such plan and scheme into effect defendants, and other members of defendant organizations cooperating and conspiring with defendants, have always notified plaintiffs and the class they represent, in diverse ways and in particular by means of the *"Exhibits"* hereto annexed, that unless plaintiffs and the class they represent enter into contracts in compliance with said price and minimums lists, plaintiffs and the class they represent will not be subject to union discipline and reprisal and they will not be permitted to function as orchestra leaders, will not be permitted to hire musicians, will not be permitted to use facilities controlled by defendants or those in sympathy with defendants; all of which means, in effect, that plaintiffs and the class they represent would not be permitted to function as orchestra leaders and to render musical services in the U. S. A. because of defendants' monopolistic control over musical services and because of the further fact that defendants are operating in collaboration with orchestra leaders who are willing to abide by the exactions of defendants.

52. By reason of the above mentioned acts or torts of defendants and those in concert with them, plaintiffs and the class they represent are threatened with heavy irreparable and immediate loss and damage because of their inability to function in their profession and to secure musi-

cians; because of the instability caused by defendants' arbitrary rules; because of the general interruption and disorganization of their business caused by the above mentioned acts or torts; because of the injury to the advantageous relationships which plaintiffs and the class they represent enjoy with their clients; because defendants impose regulations respecting minimums and in other respects. If defendants are permitted to continue their unlawful combination or conspiracy in restraint of trade and their attempt to monopolize interstate commerce as aforesaid, plaintiffs and the class they represent will be irreparably damaged.

53. Plaintiffs have no adequate remedy at law, and plaintiffs have protested in vain against defendants' said acts and torts. Moreover, no labor dispute within the meaning of the Norris-La-Guardia Act is involved in this action.

WHEREFORE, Plaintiffs demand:

1. That a temporary restraining order and a preliminary injunction issue out of this Court, and upon its order, enjoining and restraining defendants, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal services or otherwise during the pendency of this action and until entry of final judgment herein, from

(a) putting into effect, or imposing upon any employer who is a member of defendant labor unions, any of the new "Price List Resolutions" and "New Minimums" made by defendants and promulgated by them in ALLEGRO, (the monthly publication of defendant, Local 802) or otherwise;

(b) interfering in any manner with plaintiffs or any member of the class represented by plaintiffs in the purchase, sale, conducting, hiring, controlling or leading of musical services rendered by employer musicians or employee musicians.

(c) interfering in any way with plaintiffs or the class they represent with employees of plaintiffs or of the class they represent in the playing of any musical instrument or in the rendering of any musical services because of the failure or refusal of plaintiffs (or of the class they represent) to comply with said new "Price List Resolutions" and said "New Minimums".

(d) using in collaboration with employers economic pressures or concerted activities, such as strikes, work stoppages, boycotts, picketing or similar methods for the purpose of enforcing the price fixing arangements, concluded with employers, which are included in said new "Price List Resolutions" and said "New Minimums";

2. For a permanent injunction, after trial, as hereinabove specified.

3. For a decree of this Court that the aforesaid price list and the contracts coerced or induced by defendants and those in concert with them, which tend to create a monopoly with respect to musical services in the United States are void and that all contracts enter into between employer conductors, orchestra leaders on the one hand and their clients on the other hand which comply with defendants' monopolizing impositions are also void.

4. For a decree ascertaining the damages suffered by plaintiffs by reason of the aforesaid unlawful acts of defendants and awarding judgment in favor of plaintiffs against defendants and each of them for thrice the amount of said damages, costs and a reasonable attorneys fee.

5. For such other and further relief as this Court deems proper.

GODFREY P. SCHMIDT,
of Counsel
SCHMIDT & MCDONALD,
12 East 41st Street,
New York 17, N. Y.

Exhibit H. Annexed to Complaint in 60 Civil 2939

RESOLUTION No. 1

WHEREAS, There has been no general increase in Club Date Scale since 1955, and

WHEREAS, high living costs impose an ever-increasing hardship on musicians who depend exclusively on Club Dates for a living, and

WHEREAS, Workers in other branches of the Catering business have recently received wage increases, and

WHEREAS, Purchasers of music can afford an increase since music remains a relatively small part of the total party budget, and is indispensable for a successful affair, and

WHEREAS, Leaders' guarantee of additional fees, as provided by union rule, as well as the prerogative of booking in volume and/or over-scale, affords ample earning potential on Club Dates, therefore

BE IT RESOLVED, that a general scale increase be effected for club dates incorporating the following points:

(a) No distinction between afternoon and night jobs shall be made with regard to hours or price, except that Saturday night shall remain a premium night.

(b) When dancing occurs, afternoon or night, four (4) hour jobs shall prevail.

(c) When there is no dancing, three (3) hour jobs shall prevail, except that on Saturday night four (4) hours shall prevail at all times.

(d) Shows shall be $6.00 extra on all non-continuous jobs.

BE IT FURTHER RESOLVED

(e) Class A scale, Sunday to Saturday afternoon, 4 hours, terminating no later than 1:00 A. M., at night jobs,

or if given during the day no later than 7:00 P. M. .... $28.00. Overtime .... $7.00 an hour.

(f) Class A scale, Sunday to Saturday afternoon, 3 hours, only when no dancing occurs .... $21.00. Overtime .... $7.00 an hour.

(g) Class A scale, Saturday night, 4 hours, terminating no later than 1:00 A. M. .... $32.00. Overtime .... $8.00 an hour.

(h) Continuous Jobs, Sunday through Saturday afternoon $40.00. Overtime .... $11.00 an hour.

(i) Continuous Jobs, Saturday night .... $44.00. Overtime $12.00 an hour.

(j) Fashion Shows, 2 hours .... $22.00. Overtime $7.00 an hour.

(k) Pre-heats, $9.50 an hour. $12.00 continuous.

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Exhibit J. Annexed to Complaint in 60 Civil 2939

SINGLE ENGAGEMENT

Contract Blank

Associated Musicians of Greater New York

LOCAL 802, AMERICAN FEDERATION OF MUSICIANS, NEW YORK 19, N. Y.

THIS CONTRACT for the personal services of musicians, made this _____ day of _____, 19____, between the undersigned employer (hereinafter called the "employer") and _____ musicians (hereinafter called "employees").
(Including the Leader)

WITNESSETH, That the employer hires the employees as musicians severally on the terms and conditions below. The leader represents that the employees already designated have agreed to be bound by said terms and conditions. Each employee yet to be chosen shall be so bound by said terms and conditions upon agreeing to accept his employment. Each employee may enforce this agreement. The employees severally agree to render collectively to the employer services as musicians in the orchestra under the leadership of _____ as follows:

Name and Address of Place of Engagement _____

Date of Employment _____ Welfare _____ Cartage _____

Type of Engagement _____ Name of Room _____

Hours of Employment _____ Doubling _____

_____ Mileage and Transp. _____

Price Agreed Upon: $ _____ OVERTIME $ _____ per hour or part thereof.

In the event there is a SHOW of more than 20 Minutes (Cumulative time) to be played, said SHOW must be played by the entire Orchestra, and there will be an additional charge of $ _____ for playing of said SHOW, exclusive of Rehearsal time.

TOTAL PRICE AGREED UPON $ _____

This price includes expenses agreed to be reimbursed by the employer in accordance with the attached schedule, or a schedule to be furnished the employer on or before the date of engagement.

To be paid _____
(Specify when payments are to be made)

Upon request by the American Federation of Musicians of the United States and Canada (herein called the "Federation") or the local in whose jurisdiction the employees shall perform hereunder, the employer either shall make advance payment hereunder or shall post an appropriate bond.

ADDITIONAL TERMS AND CONDITIONS

If any employees have not been chosen upon the signing of this contract, the leader shall, as agent for the employer and under his instructions, hire such persons and any replacements as are required for persons who for any reason do not perform any or all services. The employer shall at all times have complete control over the services of employees under this contract, and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance. The agreement of the employees to perform is subject to proven detention by sickness, accidents, or accidents to means of transportation, riots, strikes, epidemics, acts of God, or any other legitimate conditions beyond the control of the employees. On behalf of the employer the leader will distribute the amount received from the employer to the employees, (including himself, as indicated on the opposite side of this contract, or in place thereof on separate memorandum supplied to the employer at or before the commencement of the employment hereunder and take and turn over to the employer receipts therefor from each employee, including himself. The amount paid to the leader includes the cost of transportation, which will be reported by the leader to the employer.

All employees covered by this agreement must be members in good standing of the Federation. However, if the employment provided for hereunder is subject to the Labor-Management Relations Act, 1947, all employees, who are members of the Federation when their employment commences hereunder, shall be continued in such employment only so long as they continue such membership in good standing. All other employees covered by this agreement, on or before the thirtieth day following the commencement of their employment, or the effective date of this agreement, whichever is later, shall become and continue to be members in good standing of the Federation. The provisions of this paragraph shall not become effective unless and until permitted by applicable law.

To the extent permitted by applicable law, nothing in this contract shall ever be construed so as to interfere with any duty owing by any employee hereunder to the Federation pursuant to its Constitution, By-laws, Rules, Regulations and Orders.

Any employees who are parties to or affected by this contract are free to cease service hereunder by reason of any strike, ban, unfair list order or requirement of the Federation, and shall be free to accept and engage in other employment of the same or similar character or otherwise, for other employers or persons without any restraint, hindrance, penalty, obligation or liability whatever, any other provisions of this contract to the contrary notwithstanding.

Representatives of the local in whose jurisdiction the employees shall perform hereunder shall have access to the place of performance (except to private residences) for the purpose of conferring with the employees.

The performances to be rendered pursuant to this agreement are not to be recorded, reproduced, or transmitted from the place of performance, in any manner or by any means whatsoever, in the absence of a specific written agreement between the employer and the Federation relating to and permitting such recording, reproduction or transmission.

The employer represents that there does not exist against him, in favor of any member of the Federation, any claim of any kind arising out of musical services rendered for any such employer. No employee will be required to perform any provisions of this contract or to render any services for said employer as long as any such claim is unsatisfied or unpaid, in whole or in part. If the employer breaches this agreement, he shall pay the employees, in addition to damages, 6% interest thereon plus a reasonable attorney's fee.

The employer, in signing this contract himself, or having same signed by a representative, acknowledges his (her or their) authority to do so and hereby assumes liability for the amount stated herein, and, if applicable to the services to be rendered hereunder, acknowledges his liability to provide workmen's compensation insurance and to pay social security and unemployment insurance taxes.

To the extent permitted by applicable law, there are incorporated into and made part of this agreement, as though fully set forth herein, all of the By-laws, Rules and Regulations of the Federation and of any local of the Federation in whose jurisdiction services are to be performed hereunder (insofar as they do not conflict with those of the Federation), and the employer acknowledges his responsibility to be fully acquainted, now and for the duration of this contract, with the contents thereof.

The undersigned, whether signing this contract as principal, agent or otherwise, in order to induce Local 802, A. F. of M., to approve this contract, personally undertakes to pay, and will be principally responsible for the payment of all sums required to be paid hereunder.

Employer's Name	Leader's Name	Local No.
Signature of Employer	Signature of Leader	Membership Card No.
Street Address	Street Address	
City / State	City / State	
Phone	Booking Agent	

If this contract is made by a Booking booking agent, there must be inserted on the reverse side of this contract the name, address and telephone number of the collecting agent of the local in whose jurisdiction the engagement is to be performed.

COLLECTING AGENT OF LOCAL ____________________

ADDRESS ____________________ CITY ____________________ STATE ____________________

TELEPHONE ____________________

Names of Employees	Local Number	S. S. Number	Wages
(LEADER)			$

Answer in 60 Civil 2939

(Tr. pp. 2212-2222)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants, answering the complaint herein, by Ashe & Rifkin, their attorneys, allege:

1. Deny each and every allegation set forth in paragraphs "1", "23", "27", "29", "30", "35", "36", "37", "38", "39", "40", "41", "42", "43", "44", "45", "46", "47", "48", "49", "50", "51", "52" and "53" of the complaint.

2. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "3", "4" and "26" of the complaint.

3. Admit that the individual plaintiffs are members in good standing of defendant Local 802 and of defendant American Federation of Musicians; and except as so admitted, deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "2" of the complaint.

4. Admit that defendant American Federation of Musicians is a labor union; that it is affiliated with the AFL-CIO; that its principal office is located at 425 Park Avenue, New York 22, N. Y.; and that it is an international union, comprising numerous local unions, including defendant Local 802; and, except as so admitted, deny each and every allegation set forth in paragraph "5" of the complaint.

5. Admit that defendant Local 802 is a labor union; that it is affiliated with defendant American Federation

of Musicians; and that its principal office is located at 261 West 52nd Street, New York 19, N. Y.; and, except as so admitted, deny each and every allegation set forth in paragraph "6" of the complaint.

6. Admit that the various local unions affiliated with defendant American Federation of Musicians have their principal offices in various parts of the United States and Canada; that its membership exceeds a total of 260,000 musicians throughout the United States, in Canada, in Puerto Rico and in the Virgin Islands, and consists of performers on musical instruments, including conductors, arrangers and copyists; and, except as so admitted, deny each and every allegation set forth in paragraph "7" of the complaint.

7. Admit that Exhibit C annexed to the complaint is a copy of the "Price List Governing Single and Steady Engagements" of defendant Local 802, revised as of June 1, 1959, as alleged in paragraph "16" of the complaint; and allege further that the term "price list" as used in the said Exhibit is a misnomer, the said Exhibit being in truth and in fact a list of the minimum wage scales at which members of Local 802 are ready and willing to perform labor, and that such wage scales were established, and have been established for more than forty (40) years, by the members of Local 802 themselves.

8. Admit that Exhibit D annexed to the complaint is a copy of the "Single Engagement Minimums" of defendant Local 802, revised as of June 1, 1959, as alleged in paragraph "17" of the complaint; and allege further that the said Exhibit lists additional minimum working conditions under which members of Local 802 are ready and willing to perform labor, and that such minimum conditions were established, and have been established for many years, by the members of Local 802 themselves.

9. Admit that Exhibit E annexed to the complaint is a copy of the "Wage Scales, Rules and Regulations Gov-

erning Steamships", published by defendant Local 802, as alleged in paragraph "18" of the complaint; and allege further that the said Exhibit lists the minimum wage scales and working conditions under which members of Local 802 are ready and willing to perform labor on steamships; and that such minimum wage scales and conditions were established, and have been established for many years, by the members of Local 802 themselves.

10. Admit that Exhibit F annexed to the complaint is a copy of the "By-Laws Affecting Traveling Members", published by defendant American Federation of Musicians, as alleged in paragraph "19" of the complaint; and allege further that the said Exhibit lists the minimum conditions under which members of the American Federation of Musicians are ready and willing to perform labor when traveling, and that such minimum conditions were established, and have been established for many years, by the members of the American Federation of Musicians through their chosen delegates and representatives.

11. Admit that Exhibit G annexed to the complaint is a copy of a notice appearing in the June 1960 issue of "Allegro", listing revisions of Exhibit D annexed to the complaint, as alleged in paragraph "20" of the complaint; and allege further that the said revisions were adopted in the same manner and under the same procedures as have been followed for many years in defendant Local 802 for the establishment of such "minimums".

12. Admit that Exhibit H annexed to the complaint sets forth changes in the "Price List Governing Single and Steady Engagements" (Exhibit C), as alleged in paragraph "22" of the complaint; and allege further that the term "price list" as used in the said Exhibit is a misnomer, the changes set forth in the said Exhibit being in truth and in fact changes in the minimum wage scales at which members of Local 802 are ready and willing to perform labor, and that such changes were adopted in

the same manner and under the same procedures as have been followed for many years in defendant Local 802 for the establishment of such minimum wage scales.

13. Admit that Exhibit B and C annexed to the complaint set forth the distinction between single and steady engagements; and, except as so admitted, deny each and every allegation set forth in paragraph "24" of the complaint.

14. Admit that defendant Local 802 has about 30,000 members, including the individual plaintiffs; and, except as so admitted, deny each and every allegation set forth in paragraph "25" of the complaint.

15. Admit that defendants American Federation of Musicians and Local 802 admit orchestra conductors or leaders to membership; and, except as so admitted, deny each and every allegation set forth in paragraph "28" of the complaint.

16. Admit that defendants American Federation of Musicians and Local 802 are labor organizations; and, except as so admitted, deny each and every allegation set forth in paragraph "31" of the complaint.

17. Admit that the By-Laws of the defendant American Federation of Musicians require members to include certain provisions in all contracts for the rendition of musical services, and that Exhibits J and K annexed to the complaint are examples of forms of contract containing such provisions; and, except as so admitted, deny each and every allegation set forth in paragraph "32" of the complaint.

18. Admit that Exhibits A and B annexed to the complaint constitute contracts between the defendant unions and their respective memberships; and, except as so admitted, deny each and every allegation set forth in paragraph "3" of the complaint.

19. Admit that the individual plaintiffs have refused to comply with the provisions of the new minimum wage

scales and the minimum number of musicians to perform on various types of engagements, but allege further that the said plaintiffs have for many years complied with previous minima which were established in the same manner and under the same procedures as were employed in establishing the new minima; and, except as so admitted, deny each and every allegation set forth in paragraph "34" of the complaint.

AS AND FOR A FIRST COMPLETE DEFENSE

20. Plaintiffs and defendants are engaged in the same industry, trade, craft or occupation, to wit, the musical entertainment industry, and plaintiffs are members of the defendant organizations of employees.

21. A controversy concerning terms or conditions of employment and concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment exists between plaintiffs and defendants, arising out of plaintiffs' claim that they are "employers" and that terms or conditions of employment are being imposed upon them by their "employees" through the defendant labor unions without bargaining or agreement.

22. By reason of the foregoing, this action involves and grows out of a labor dispute as defined in Section 13 of the Norris-LaGuardia Act (29 USCA, Sections 101-115), and pursuant to the provisions of the said Act this Court does not have jurisdiction to issue the injunction sought by plaintiffs herein.

AS AND FOR A SECOND COMPLETE DEFENSE

23. Defendants American Federation of Musicians and Local 802 are labor unions, and as such represent their members in connection with the rendition of labor by such members in the performance of musical services.

24. The labor of the said members in the performance of musical services is not a commodity or article of commerce, and the defendants, in carrying on the activities of which plaintiffs complain, are pursuing legitimate labor union objectives in the self-interest of their members by establishing minimum wage scales and other minimum conditions of employment for said members.

25. By reason of the foregoing, the defendants' acts of which plaintiffs complain are immunized from injunctive restraint under the Sherman Act (15 USCA, Sections 1 and 2) by the provisions of the Clayton Act (15 USCA, Section 17; 28 USCA, Section 52).

AS AND FOR A THIRD COMPLETE DEFENSE

26. Repeat and reiterate each and every allegation set forth in paragraphs "20" and "21", of this answer as if herein more fully and at length set forth.

27. The primary and exclusive jurisdiction to determine the issues of whether the individual plaintiffs are employers and whether defendants are required to bargain collectively with them is vested in the National Labor Relations Board under the National Labor Relations Act as amended (29 USC, Ch. 7).

28. Plaintiffs, recognizing the said jurisdiction of the National Labor Relations Board, on or about March 14, 1960 filed a charge with the said Board against defendant Local 802 (NLRB Case No. 2-CB-2855), alleging that Local 802 was engaging in unfair labor practices within the meaning of Section 8(b) (1) and (3) of the said National Labor Relations Act, in that plaintiffs were employers and Local 802 was refusing to bargain collectively with them as to one part of the aforesaid "price list."

29. The National Labor Relations Board's Regional Director, after a thorough investigation of the facts, re-

fused to issue a complaint "because there is insufficient evidence of any violation of the Act", and, on an appeal taken by plaintiffs, the said ruling was upheld by the Board's General Counsel.

30. By reason of the foregoing, this Court is preempted from jurisdiction to determine the subject matter of this action.

AS AND FOR A FOURTH COMPLETE DEFENSE

31. The performance of a single musical engagement by plaintiffs or by any other members of the defendant labor unions, no matter where performed, is a purely local affair and does not constitute interstate commerce within the meaning of Sections 1 and 12 of the aforesaid Sherman Act.

32. By reason of the foregoing, the defendants' acts complained of by plaintiffs cannot and do not constitute violations of the said Sherman Act, and this Court is without jurisdiction over the subject matter of this action.

AS AND FOR A FIFTH COMPLETE DEFENSE

33. Repeat and reiterate each and every allegation set forth in paragraphs "7", "8", "9", "10", "11" and "12" of this answer, as if herein more fully and at length set forth.

34. The individual plaintiffs have been members of the defendant labor unions for more than fifteen years and throughout the said period they accepted the aforesaid minimum wage scales and working conditions and the manner in which they were established and applied.

35. By reason of the foregoing, plaintiffs have been guilty of laches which debar them for any equitable relief such as they seek in this action.

AS AND FOR A SIXTH COMPLETE DEFENSE

36. Repeat and reiterate each and every allegation set forth in paragraphs "7", "8", "9", "10", "11", "12", "34" and "35" of this answer, as if herein more fully and at length set forth.

37. The pattern under which the defendant labor unions operate with respect to single engagements has been set for so many years that the issuance of an injunction at this time would cause more harm to the defendants and their thousands of members than it would benefit plaintiff.

38. By reason of the foregoing, plaintiffs are not entitled to any equitable relief.

AS AND FOR A SEVENTH COMPLETE DEFENSE:

39. Repeat and reiterate each and every allegation set forth in paragraphs "3" and "18" of this answer, as if herein more fully and at length set forth.

40. At all times mentioned in the complaint herein, the By-Laws of defendant American Federation of Musicians (Exhibit A, annexed to the complaint herein) have provided and still provide, in Article 8, Section 1 and 2:

> "Section 1. An appeal can be made to The International Executive Board from any decision, of whatever kind, of a Local or any other authority. A further appeal can be made to a Convention in any case involving an ultimate fine of $500.00 or more, or expulsion from membership in the Federation, regardless of whether the original decision was made by a local or by the International Executive Board".
>
> "Section 2. In the event of an appeal to the International Executive Board or to a Conveniton the appellant may request a stay of judgment from the International President, who shall decide whether or not the appellant is entitled to same".

41. The foregoing provisions of the By-Laws of defendant American Federation of Musicians have provided and still provide ample and complete remedies for the alleged grievances of the individual plaintiffs which constitute the basis of their complaint herein.

42. The individual plaintiffs have not taken or attempted to take the aforesaid appeals as provided in the said By-Laws.

43. By reason of the foregoing, the individual plaintiffs have instituted and still prosecute this action without having first exhausted the means of redress provided by the said By-Laws of defendant American Federation of Musicians, and they are, therefore, not entitled to any of the relief sought by them in this action.

AS AND FOR AN EIGHTH COMPLETE DEFENSE AS AGAINST PLAINTIFF ASSOCIATION:

44. Plaintiffs Orchestra Leaders of Greater New York, and Charles Turecamo and Joseph Carroll as Treasurer and Secretary thereof have not alleged in the complaint herein that the said plaintiffs in the said capacities have been injured in their business or property by any of the acts alleged to have been committed by defendants, and the said plaintiffs in the said capacities have not in fact been so injured.

45. By reason of the foregoing, the said plaintiffs have no standing to institute this action under the provisions of the Sherman Act, and are not entitled to the relief sought by them herein.

AS AND FOR A NINTH COMPLETE DEFENSE:

46. Plaintiffs cannot fairly insure the adequate representation of all members of the class for which they presume to bring this action, nor does their complaint herein define the members of the said class who are alleged to be

similarly situated as plaintiffs or that the said alleged class does not include persons of hostile, antagonistic or differing interests.

47. By reason of the foregoing, no class action is authorized herein by Rule 23 of the Federal Rules of Civil Procedure.

WHEREFORE, defendants, respectfully pray for judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: November 9th, 1960.

ASHE & RIFKIN
Attorneys for Defendants
305 Broadway
New York 7, N. Y.

By DAVID I. ASHE,
A Member of the Firm.

Complaint in 60 Civil 4926

(Tr. pp. 3245-3256)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs, by SCHMIDT & MCDONALD, their attorneys, for their complaint, allege:

1. This action arises under the Laws of the United States, specifically the Sherman and Clayton Anti-Trust Acts (15 U. S. Code, sections 1, 2, 15 and 26); and under the laws of the State of New York, specifically, section 340 of the General Business Law of the State of New York; and under the common law of the State of New York.

2. Plaintiffs, JOSEPH CARROLL and CHARLES PETERSON are orchestra leaders and are, and for many years have been, members in good standing of LOCAL 802 ASSOCIATED MUSICIANS OF GREATER NEW YORK, (hereinafter referred to as LOCAL 802 and of defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA). Their business addresses are respectively: 174 East 74th Street, New York 21, N.Y., and 110 West 34th Street, New York 1, N. Y.

3. Plaintiff, ORCHESTRA LEADERS OF GREATER NEW YORK, an unincorporated association within the meaning of the General Associations Law of the State of New York. Its membership comprises of more than ten orchestra leaders, all of whom are members of defendant unions and some of whom belong to other Locals affiliated with the AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA. Its office is located at 174 East 74th Street, New York 21, N.Y.

4. Plaintiffs, CHA[redacted] TURECAMO and JOSEPH CARROLL, are the Treasurer and the Secretary, respectively, of ORCHESTRA LEADERS OF GREATER NEW YORK.

5. Defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, (hereinafter called INTERNATIONAL ORGANIZATION) is (with the qualification alleged below) a labor union or labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959. It is affiliated with the AFL-CIO and its principal office is located at 425 Park Avenue, New York 22, N. Y. It is an international union, comprising numerous local unions, one of which is defendant LOCAL 802.

6. Defendant, LOCAL 802, is (with the qualification alleged below) a Labor organization within the meaning of Section 3, subdivision i, of the Labor-Management Reporting and Disclosure Act of 1959; it is affiliated with (a) the

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, as one of its locals and (b) the AFL-CIO. Its principal office is located at 26 West 52nd Street, New York 19, N. Y.

7. The various locals affiliated with defendant, AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, have their principal offices in various States of the United States and in Canada, and their membership exceeds a total of 260,000 orchestra leaders and sidemen in practically every State of the United States, in Canada, in Puerto Rico, and in the Virgin Islands.

8. Defendant, HERMAN D. KENIN is, and for some time past has been, President of the INTERNATIONAL ORGANIZATION.

9. Defendant, STANLEY BALLARD is, and for some time past has been, Secretary of the INTERNATIONAL ORGANIZATION.

10. Defendant, GEORGE V. CLANCY is, and for some time past has been, Treasurer of the INTERNATIONAL ORGANIZATION.

11. Defendant, AL MANUTI is, and for some time past has been, President of LOCAL 802.

12. Defendant, MAX L. ARONS is, and for some time past has been, Secretary of LOCAL 802.

13. Defendant, HI JAFFE is, and for some time past has been, Treasurer of LOCAL 802.

14. LOCAL 802, regularly publishes an official, printed magazine entitled "ALLEGRO", which is issued monthly.

15. Annexed hereto, marked "*Exhibit A*", to form part of this complaint is a copy of a notice appearing in ALLEGRO (issue of November, 1960) by which defendants established a "General Scale Increase for Special Class Club Dates".

16. Plaintiffs bring this action for themselves and for all members (so numerous as to make it impractical to bring them all before the Court) of LOCAL 802 and of the INTERNATIONAL ORGANIZATION who are similarly situated; and this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class; and this class action is authorized by Rule 23 of the Federal Rules of Civil Procedure.

17. Plaintiffs and the class they represent, are: (a) employers who regularly employ sidemen or employee musicians who are members of the INTERNATIONAL ORGANIZATION, of LOCAL 802 and of other locals affiliated with the INTERNATIONAL ORGANIZATION; and (b) independent contractors who are largely engaged in the single engagement field; i.e., they are hired *ad hoc* by clients to furnish musical services for weddings, banquets, dances and other occasions which are not steady engagements.

18. Defendant, LOCAL 802, has a membership of some thirty thousand (30,000) members, including plaintiffs and the class they represent.

19. Plaintiffs, and the class they represent as employers and independent contractors, frequently fulfill single engagements outside of the State in which they usually operate and in which their principal offices are located. Plaintiffs and the class they represent gross millions of dollars of income per year from such engagements in various States of the United States in connection with which they render musical services outside of the State in which they usually operate or in which their principal offices are found. Many of the purchasers of such musical services (the clients whom plaintiffs and the class they represent serve) are large companies engaged in interstate or foreign commerce. Many of the sidemen or musicians employed by plaintiffs and the class they represent derive, each year,

hundreds of thousands of dollars from rendering their musical services in various States of the United States outside of the State in which they reside or in which they usually render such musical services.

20. Plaintiffs, as independent contractors and employers, operate their several businesses independently; have their own usual and occasional clientele, employ sidemen or musicians for each particular occasion, direct such musicians themselves or assign directors for them, control or discipline such employees, conduct all negotiations leading to engagements, regulate the style and manner of performance by their orchestras during such engagements and regularly and necessarily employ their sidemen and musicians to assist them in carrying out their engagements which they cannot fulfill without such assistance. The named plaintiffs commonly provide such musical services regularly in New York, New Jersey, Connecticut and Pennsylvania as well as other States.

21. Defendants, as a matter of long standing practice and policy, have insisted and do insist that orchestra leaders, especially those engaged in the single engagement field, shall become and remain members in good standing of the local unions affiliated with defendant, INTERNATIONAL ORGANIZATION.

22. Such insistence has been enforced from time to time by strikes, boycotts, picketing and other concerted action or by threat of such action; and the threat of such action affects the interstate and intrastate business involvement of the plaintiffs and the class they represent and their employees and sidemen.

23. Defendant labor organizations are undoubtedly labor unions or labor organizations within the meaning of State and Federal laws governing labor relations when they purport to act on behalf of employees in collective bargaining; but when they purport to act on behalf of any com-

bination, arrangement or conspiracy between certain employers and themselves, they do not act as labor unions or labor organizations, and it is impossible for said defendant unions simultaneously and without conflict of interest to represent plaintiffs and the class they represent (employer orchestra leaders) on the one hand and the employees of such orchestra leaders on the other hand.

24. The Constitution and By-Laws of defendant labor unions constituted contracts (or purported contracts where membership is not free but coerced) obligating plaintiffs and the class they represent as well as defendants and also all musicians at any time employed by plaintiffs and the class they represent. However, such contracts or purported contracts are in most cases not willingly assumed by employing orchestra leaders because many of them have been coerced into membership in defendant unions upon the basis of boycotts, strikes, picketing and other forms of concerted economic pressure or reprisal or upon the basis of threat of such pressure or reprisal.

25. Some orchestra leaders, including plaintiffs have refused to comply with the impositions upon employers and employees made by defendants in the form of wage scales, price lists and minimum and amendments thereof; while other orchestra leaders cooperate with defendants in fulfilling such price lists and minimums.

26. Defendants implement their monopoly of power by imposing at times upon the plaintiffs and the class they represent the equivalent of the obligations of a labor contract without ever indulging in collective bargaining; they also impose upon plaintiffs and the class they represent the aforesaid scales, price lists and minimums without bargaining or agreement of any kind; they depend upon their monopoly position from which they control employee and employer musicians, for the purpose of inducing or coercing willing or unwilling, cooperation from orchestra leaders in applying the minimums and scales and prices aforesaid.

27. Defendants, in combination or cooperation with certain orchestra leaders, have arranged and are presently arranging or comspiring to fix prices for musical service in the United States by requiring plaintiffs and the class they represent to agree to the scales, minimums and prices aforesaid.

28. The typical agreements enacted by defendants from all orchestra leaders as employers or independent contractors incorporate all of the restrictive practices and features herein complained of.

29. Defendants have in purpose or effect monopolized and are attempting to monopolize by the aforesaid arrangements and combination the marketing and sale of musical services throughout the United States and especially in the Greater New York area; and they have restrained, and have been and are engaged in a combination and conspiracy to restrain competition in the marketing of such musical services and to restrain trade and commerce among the several states all in violation of the Sherman Anti-Trust Act (15 U. S. Code Sections 1 and 2); and defendants' activities also constitute a violation of section 340 of the General Business Law of the State of New York.

30. The regulations aforesaid (especially the price list and minimum made and promulgated by defendants) constitute a contract, combination or conspiracy in restraint of trade or commerce among the several states, because defendants collaborate with and exact compliance from a significant number of orchestra leaders who employ musicians and sidemen and who willingly comply with defendants' said regulations.

31. Defendants by said price list and minimum list and by their policy and practice as herein set forth restrict competition by unlawful restraints of trade and engage in unfair methods of competition.

32. The purpose or effect of defendants by their aforesaid policy and practice and by the said regulations is to eliminate or destroy competition or competitive business from the single and steady engagement field and to unduly and unreasonably restrict in that field the freedom of plaintiffs and these similarly situated to enter into normal business contracts or to fulfill them by access to the labor market.

33. The purpose or effect of defendants' aforesaid policy and practice, as well as their price and minimum lists, is to impose restraints upon commerce within the State of New York which have a significant impact and influence upon commerce between the several states; and such appreciable local contractual and other restraints upon commerce exert in turn a substantial influence or effect upon commerce between the states.

34. The purpose or effect of defendants' aforesaid policy and practice, as well as of the aforesaid price and minimum lists, is solely to control prices in the single and steady engagement field.

35. The purpose or effect of defendants' aforesaid policy and practice and of said minimums and price lists is to foreclose access to a free market in musical services and to effectuate, within defendant unions and the circle of cooperating orchestra leaders or employers a monopoly controlling, on a national basis, the market for musical services.

36. By their aforesaid scales, price and minimum lists, defendants fix prices of all of most musical services coming within the stream of inter-state commerce.

37. The purpose or effect of defendants by the aforesaid policy, practice and lists is to boycott all third parties or to visit upon them other economic reprisals unless they fall into line with defendants' aforesaid contract, combination, conspiracy or arrangement in restraint of trade.

38. The purpose or effect of the aforesaid policy, practice and lists of defendants is to cause an unnatural increase in the general level of prices for musical services within the area of interstate commerce and to exclude other competitors from the market for such musical services; and to effect bankruptcy or serious financial loss to orchestra leaders who, like plaintiffs and the class they represent, refuse to comply with the aforesaid policy, practice and lists of the defendants.

39. Defendants have also formed a common law conspiracy to commit the above mentioned acts and torts against plaintiffs and the class they represent and in violation of law have conspired to interfere, and have in fact interfered, with reciprocal relationships between plaintiffs and the class they represent on the one hand and the clients who retain said plaintiffs and said class as independent contractors on the other hand.

40. Insofar as defendant labor organizations do and have done and are continuing to do the aforesaid things and commit the aforesaid acts and torts, they are not bona fide labor organizations within the meaning of state and federal relations laws and they cannot properly avail themselves of any statutory privileges and immunities enjoyed by genuine labor organizations.

41. Defendants by the arrangements or conspiracy aforesaid have entered into a plan and scheme the purpose or effect of which is to completely control the employment of employee musicians and their availability to plaintiffs and the class they represent, and also to control the marketing and price of all musical services in the States of the United States and in Canada; and in carrying said plan and scheme into effect they have persuaded, induced and in some instances coerced orchestra leaders in several states of the United States to join defendants under agreements that as members of defendant organizations, they

will not make musical services available to anyone who does not enter into agreements to comply with the aforesaid prices and minimums lists.

42. In carrying such plan and scheme into effect, defendants, and other members of defendant organizations cooperating and conspiring with defendants, have always notified plaintiffs and the class they represent, in diverse ways and in particular by means of the *"Exhibits"* hereto annexed, that unless plaintiffs and the class they represent, enter into contracts in compliance with said price and minimum lists, plaintiffs and the class they represent will not be subject to union discipline and reprisal and they will not be permitted to function as orchestra leaders, will not be permitted to hire musicians, will be permitted to use facilities controlled by defendants or those in sympathy with defendants, which means, in effect, that plaintiffs and the class they represent would not be permitted to function as orchestra leaders and to render musical services in the U. S. A. because of defendants' monopolistic control over musical services and because of the further fact that defendants are operating in collaboration with orchestra leaders who are willing to abide by the exactions of defendants.

43. By reasons of the above mentioned acts or torts of defendants and those in concert with them, plaintiffs and the class they represent are threatened with heavy irreparable and immediate loss and damage because of their inability to function in their profession and to secure musicians; because of the instability caused by defendants' arbitrary rules; because of the general interruption and disorganization of their business caused by the above mentioned acts or torts; because of the injury to the advantageous relationship which plaintiffs and the class they represent enjoy with their clients; because defendants impose regulations respecting minimums and in other respects. If defendants are permitted to continue their unlawful combination or conspiracy in restraint of trade

and their attempt to monopolize inter-state commerce as aforesaid plaintiffs and the class they represent will be irreparably damaged.

44. Plaintiffs have no adequate remedy at law, and plaintiffs have protested in vain against defendants said acts and torts. Moreover, no labor dispute within the meaning of the Norris-LaGuardia Act is involved in this action.

WHEREFORE Plaintiffs demand:

1. That a temporary restraining order and a preliminary injunction issue out of this Court, and upon its order, enjoining and restraining defendants, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them who receive actual notice of this order by personal services or otherwise during the pendency of this action and until entry of final judgment herein, from

(a) putting into effect, or imposing upon any employer who is a member of defendant labor unions, any of the new "General Scale Increases" made by defendants and promulgated by them in ALLEGRO, (the monthly publication of defendant, Local 802) or otherwise;

(b) interfering with plaintiffs in any manner or interfering with any member of the class represented by plaintiffs, in the purchase, sale, conducting, hiring, controlling or leading of musical services rendered by employer musicians or employee musicians.

(c) interfering in any way with plaintiffs or the class they represent in the playing of any musical instrument or in the rendering of any musical services because of the failure or refusal of plaintiffs (or of the class they represent) to comply with said new "General Scale Increase".

(d) using in collaboration with employers economic pressures or concerted activities, such as strikes, work

stoppages, boycotts, picketing or similar methods for the purpose of enforcing the price fixing arrangements in said new "General Scale Increase".

2. For a permanent injunction, after trial, as hereinabove specified;

3. For a decree of this Court that the aforesaid "General Scale Increase" tends to create a monopoly with respect to musical services in the United States and are void and that all contracts entered into between employer conductors, orchestra leaders on the one hand and their clients on the other hand which comply with defendants' monopolizing impositions are also void;

4. For a decree ascertaining the damages suffered by plaintiffs by reason of the aforesaid unlawful acts of defendants and awarding judgment in favor of plaintiffs against defendants and each of them for thrice the amount of said damages, costs and a reasonable attorney's fee.

5. For such other and further relief as this Court deems proper.

GODFREY P. SCHMIDT,
of Counsel,
SCHMIDT & MCDONALD,
60 East 42nd St.,
New York 17, N. Y.

Exhibit A. Annexed to Complaint in 60 Civil 4926

ALLEGRO

GENERAL SCALE INCREASE

SPECIAL CLASS CLUB DATES

The following increases in scales for Special Class were adopted by the Executive Board on October 27, 1960.

(a) No distinction between afternoon and night jobs shall be made with regard to hours or price, excepting that Saturday night shall remain a premium night.

(b) When dancing occurs, afternoon or night, four (4) hour jobs shall prevail.

(c) Where there is no dancing, three (3) hour jobs shall prevail, except that on Saturday night four (4) hours shall prevail at all times.

(d) Shows shall be $6.00 extra on all non-continuous jobs.

(e) Special Class Scale: Sunday to Saturday afternoon, four (4) hours terminating no later than 1:00 A. M., at night jobs, or if given during the day no later than 7:00 P. M., $24.00. Overtime, $6.00 per hour.

(f) Special Class Scale: Sunday to Saturday afternoon, three (3) hours, only when no dancing occurs, $18.00. Overtime, $6.00 per hour.

(g) Special Class Scale; Saturday night, four (4) hours terminating no later than 1:00 A. M., $28.00. Overtime, $7.00 per hour.

(h) Special Class Scale: Continuous jobs. Sunday to Saturday afternoon, $36.00. Overtime, $10.00 per hour.

(i) Special Class Scale: Continuous jobs, Saturday night, $40.00. Overtime, $11.00 per hour.

(j) Fashion Shows, two (2) hours, $20.00. Overtime, $6.00 per hour.

(k) Special Class Scale: $9.50 per hour. $11.00 for continuous for Pre-Heats.

Effective Date:

DECEMBER 15, 1960

Answer of Defendant Local 802 in 60 Civil 4926

(Tr. pp. 3303-3311)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI as President, MAX L. ARONS, as Secretary and HI JAFFE, as Treasurer of LOCAL 802, answering the complaint herein, by Ashe & Rifkin, their attorneys, allege:

1. Deny each and every allegation set forth in paragraphs "1", "16", "17", "20", "22", "26", "27", "28", "29", "30", "31", "32", "33", "34", "35", "36", "37", "38", "39", "40", "41", "42", "43" and "44" of the complaint.

2. Admit that the individual plaintiffs are members in good standing of defendant Local 802 and of the American Federation of Musicians and, except as so admitted, deny knowledge or information sufficient to form a belief as to

each and every allegation set forth in paragraph "2" of the complaint.

3. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "3", "4" and "19" of the complaint.

4. Admit that the American Federation of Musicians is a labor union, affiliated with the AFL-CIO, having its principal office at 425 Park Avenue, New York 22, N. Y.; and that it is an international union, consisting of numerous local unions, including defendant Local 802; and, except as so admitted, deny each and every allegation set forth in paragraph "5" of the complaint.

5. Admit that defendant Local 802 is a labor union; that it is affiliated with defendant American Federation of Musicians; and that its principal office is located at 261 West 52nd Street, New York 19, N. Y.; and, except as so admitted, deny each and every allegation set forth in paragraph "6" of the complaint.

6. Admit that the various local unions affiliated with American Federation of Musicians have their principal offices in various parts of the United States and Canada; that its membership exceeds a total of 260,000 musicians throughout the United States, in Canada, in Puerto Rico and in the Virgin Islands, and consists of performers on musical instruments, including conductors, arrangers and copyists; and, except as so admitted, deny each and every allegation set forth in paragraph "7" of the complaint.

7. Admit that defendant Local 802 has about 30,000 members, including the individual plaintiffs; and except as so admitted, deny each and every allegation set forth in paragraph "18" of the complaint.

8. Admit that the American Federation of Musicians and defendant Local 802 admit orchestra conductors or leaders to membership; and, except as so admitted, deny

each and every allegation set forth in paragraph "21" of the complaint.

9. Admit that the American Federation of Musicians and defendant Local 802 are labor organizations; and, except as so admitted, deny each and every allegation set forth in paragraph "23" of the complaint.

10. Admit that the Constitutions and By-Laws of the American Federation of Musicians and of defendant Local 802 constitute contracts between the said Unions and their respective memberships; and, except as so admitted, deny each and every allegation set forth in paragraph "24" of the complaint.

11. Admit that the individual plaintiffs have refused to comply with the provisions of the new minimum wage scales and the minimum number of musicians to perform on various types of engagements, but allege further that the said plaintiffs have for many years complied with previous minima which were established in the same manner and under the same procedures as were employed in establishing the new minima; and, except as so admitted and alleged, deny each and every allegation set forth in paragraph "25" of the complaint.

AS AND FOR A FIRST COMPLETE DEFENSE:

12. Plaintiffs, the American Federation of Musicians, and defendant Local 802 are engaged in the same industry, trade, craft or occupation, to wit, the musical entertainment industry, and plaintiffs are members of the said American Federation of Musicians and of defendant Local 802, both of which are organizations of employees.

13. A controversy concerning terms or conditions of employment and concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or condition of employment exists between plaintiffs and the American Federation of

Musicians and defendant Local 802 arising out of plaintiffs' claims that they are "employers" and that terms or conditions of employment are being imposed upon them by their "employees" through the aforesaid labor unions without bargaining or agreement.

14. By reason of the foregoing, this action involves and grows out of a labor dispute as defined in Section 13 of the Norris-LaGuardia Act (29 USCA, Sections 101-115) and pursuant to the provisions of the said Act this Court does not have jurisdiction to issue the injunction sought by plaintiffs herein.

AS AND FOR A SECOND COMPLETE DEFENSE:

15. The American Federation of Musicians and the defendant Local 802 are labor unions, and as such represent their members in connection with the rendition of labor by such members in the performance of musical services.

16. The labor of the said members in the performance of musical services is not a commodity or article of commerce, and the American Federation of Musicians and defendant Local 802 in carrying on the activities of which plaintiffs complain, are pursuing legitimate labor union objectives in the self-interest of their members by establishing minimum scales and other minimum conditions of employment for said members.

17. By reason of the foregoing, the acts of which plaintiffs complain are immunized from injunctive restraint under the Sherman Act (15 USCA, Sections 1 and 2) by the provisions of the Clayton Act (15 USCA, Section 17; 29 USCA, Section 52).

AS AND FOR A THIRD COMPLETE DEFENSE:

18. Repeat and reiterate each and every allegation set forth in paragraphs "12" and "13" of this answer as if herein more fully and at length set forth.

19. The primary and exclusive jurisdiction to determine the issues of whether the individual plaintiffs are employers and whether defendants are required to bargain collectively with them is vested in the National Labor Relations Board under the National Labor Relations Act as amended (29 USC, Ch. 7).

20. Plaintiffs, recognizing the said jurisdiction of the National Labor Relations Board, on or about March 14, 1960 filed a charge with the said Board against defendant Local 802 (NLRB Case No. 2-CB-2855), alleging that Local 802 was engaging in unfair labor practices within the meaning of Section 8(b)(1) and (3) of the said National Labor Relations Act, in that plaintiffs were employers and Local 802 was refusing to bargain collectively with them as to one part of the aforesaid "price list".

21. The National Labor Relations Board's Regional Director, after a thorough investigation of the facts, refused to issue a complaint "because there is insufficient evidence of any violation of the Act", and, on an appeal taken by plaintiffs, said ruling was upheld by the Board's General Counsel.

22. By reason of the foregoing, this Court is preempted from jurisdiction to determine the subject matter of this action.

AS AND FOR A FOURTH COMPLETE DEFENSE:

23. The performance of a single musical engagement by plaintiffs or by any other members of the American Federation of Musicians, or of defendant Local 802, no matter where performed, is a purely local affair and does not constitute interstate commerce within the meaning of Sections 1 and 2 of the aforesaid Sherman Act.

24. By reason of the foregoing, the acts complained of by plaintiffs cannot and do not constitute violations of the said Sherman Act, and this Court is without jurisdiction over the subject matter of this action.

AS AND FOR A FIFTH COMPLETE DEFENSE:

25. The "General Scale Increase for Special Class Club Dates", as set forth in "Exhibit A" annexed to the complaint, are a list of minimum wage scales at which members of defendant Local 802 are ready and willing to perform labor, and that such wage scales were established, and have been established for more than forty (40) years, by the members of Local 802 themselves.

26. The individual plaintiffs have been members of the defndant Local 802 for more than fifteen years and throughout the said period they accepted the aforesaid minimum wage scales and working conditions and the manner in which they were established and applied.

27. By reason of the foregoing, plaintiffs have been guilty of laches which debar them for any equitable relief such as they seek in this action.

AS AND FOR A SIXTH COMPLETE DEFENSE:

28. Repeat and reiterate each and every allegation set forth in paragraph "25" of this answer, as if herein more fully and at length set forth.

29. The pattern under which defendant Local 802 operates with respect to single engagements has been set for so many years that the issuance of an injunction at this time would cause more harm to Local 802 and its thousands of members than it would benefit plaintiffs.

30. By reason of the foregoing, plaintiffs are not entitled to any equitable relief.

AS AND FOR A SEVENTH COMPLETE DEFENSE:

31. Repeat and reiterate each and every allegation set forth in paragraphs "2" and "10" of this answer as if herein more fully and at length set forth.

32. At all times mentioned in the complaint herein, the By-Laws of the American Federation of Musicians have provided and still provide, in Article 8, Sections 1 and 2:

"Section 1. An appeal can be made to The International Executive Board from any decision, of whatever kind, of a Local or any other authority. A further appeal can be made to a Convention in any case involving an ultimate fine of $500.00 or more, or expulsion from membership in the Federation, regardless of whether the original decision was made by a Local or by the International Executive Board."

"Section 2. In the event of an appeal to the International Executive Board or to a Convention the appellant may request a stay of judgment from the International President, who shall decide whether or not the appellant is entitled to same".

33. The foregoing provisions of the By-Laws of the American Federation of Musicians have provided and still provide ample and complete remedies for the alleged grievances of the individual plaintiffs which constitute the basis of their complaint herein.

34. The individual plaintiffs have not taken or attempted to take the aforesaid appeals as provided in the said By-Laws.

35. By reason of the foregoing, the individual plaintiffs have instituted and still prosecute this action without having first exhausted the means of redress provided by the said By-Laws of defendant American Federation of Musicians, and they are, therefore, not entitled to any of the relief sought by them in this action.

AS AND FOR AN EIGHTH COMPLETE DEFENSE AS AGAINST PLAINTIFF ASSOCIATION:

36. Plaintiffs Orchestra Leaders of Greater New York, and Charles Turecamo and Joseph Carroll as Treasurer

and Secretary thereof have not alleged in the complaint herein that the said plaintiffs in the said capacities have been injured in their business or property by any of the acts alleged to have been committed by defendants, and the said plaintiffs in the said capacities have not in fact been so injured.

37. By reason of the foregoing, the said plaintiffs have no standing to institute this action under the provisions of the Sherman Act, and are not entitled to the relief sought by them herein.

AS AND FOR A NINTH COMPLETE DEFENSE:

38. Plaintiffs cannot fairly insure the adequate representation of all members of the class for which they presume to bring this action, nor does their complaint herein define the members of the said class who are alleged to be similarly situated as plaintiffs or that the said alleged class does not include persons of hostile, antagonistic or differing interests.

39. By reason of the foregoing, no class action is authorized herein by Rule 23 of the Federal Rules of Civil Procedure.

WHEREFORE, defendant Local 802 respectfully prays for judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated, February , 1961.

ASHE & RIFKIN
Attorneys for Defendant
Local 802
305 Broadway
New York 7, N. Y.

By DAVID I. ASHE
A Member of the Firm

Answer of Defendant Federation in 60 Civil 4926

(Tr. pp. 3641-3650)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants American Federation of Musicians of the United States and Canada, and Herman D. Kenin, as President, Stanley Ballard, as Secretary and George V. Clancy, as Treasurer, answering the complaint herein, by Ashe & Rifkin, their attorneys, allege:

1. Deny each and every allegation set forth in paragraphs "1", "16", "17", "20", "22", "26", "27", "28", "29", "30", "31", "32", "33", "34", "35", "36", "37", "38", "39", "40", "41", "42", "43" and "44" of the complaint.

2. Admit that plaintiff Joseph Carroll is a member in good standing of defendants Local 802 and the American Federation of Musicians of the United States and Canada (hereinafter called the "Federation"), and, except as so admitted, deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraph "2" of the complaint.

3. Deny knowledge or information sufficient to form a belief as to each and every allegation set forth in paragraphs "3", "4", "15" and "19" of the complaint.

4. Admit that the defendant Federation is a labor union, affiliated with the AFL-CIO, having its principal office at 425 Park Avenue, New York 22, N. Y.; and that it is an international union, consisting of numerous local unions

including defendant Local 802; and, except as so admitted, deny each and every allegation set forth in paragraph "5" of the complaint.

5. Admit that defendant Local 802 is a labor union; that it is affiliated with defendant Federation; and that its principal office is located at 261 West 52nd Street, New York 19, N.Y.; and, except as so admitted, deny each and every allegation set forth in paragraph "6" of the complaint.

6. Admit that the various local unions affiliated with the Federation have their principal offices in various parts of the United States and Canada; that its membership exceeds a total of 260,000 musicians throughout the United States, in Canada, in Puerto Rico and in the Virgin Islands, and consists of performers on musical instruments, including conductors, arrangers and copyists; and, except as so admitted, deny each and every allegation set forth in paragraph "7" of the complaint.

7. Admit, upon information and belief, that defendant Local 802 has about 30,000 members, including plaintiff Carroll; and except as so admitted, deny each and every allegation set forth in paragraph "18" of the complaint.

8. Admit that the defendants Federation and Local 802 admit orchestra conductors or leaders to membership; and, except as so admitted, deny each and every allegation set forth in paragraph "21" of the complaint.

9. Admit that the defendants Federation and Local 802 are labor organizations; and, except as so admitted, deny each and every allegation set forth in paragraph "23" of the complaint.

10. Admit that the Constitutions and By-Laws of the Federation and of Local 802 constitute contracts between the said Unions and their respective memberships; and,

except as so admitted, deny each and every allegation set forth in paragraph "24" of the complaint.

11. Admit that the individual plaintiffs have refused to comply with the provisions of the new minimum wage scales and the minimum number of musicians to perform on various types of engagements, but allege further that the said plaintiffs have for many years complied with previous minima which were established in the same manner and under the same procedures as were employed in establishing the new minima; and, except as so admitted and alleged, deny each and every allegation set forth in paragraph "25" of the complaint.

AS AND FOR A FIRST COMPLETE DEFENSE:

12. Plaintiffs, defendant Federation and defendant Local 802 are engaged in the same industry, trade, craft or occupation, to wit, the musical entertainment industry, and at least one of the plaintiffs is a member of the said Federation and Local 802, both of which are organizations of employees.

13. A controversy concerning terms or conditions of employment and concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment exists between plaintiffs and the Federation and Local 802 arising out of plaintiffs' claims that they are "employers" and that terms or conditions of employment are being imposed upon them by their "employees" through the aforesaid labor unions without bargaining or agreement.

14. By reason of the foregoing, this action involves and grows out of a labor dispute as defined in Section 13 of the Norris-La Guardia Act (29 USCA, Sections 101-115), and pursuant to the provisions of the said Act this Court does not have jurisdiction to issue the injunction sought by plaintiffs herein.

AS AND FOR A SECOND COMPLETE DEFENSE:

15. The defendants Federation of Musicians and Local 802 are labor unions, and as such represent their members in connection with the rendition of labor by such members in the performance of musical services.

16. The labor of the said members in the performance of musical services is not a commodity or article of commerce, and the Federation and Local 802, in carrying on the activities of which plaintiffs complain, are pursuing legitimate labor union objectives in the self-interest of their members by establishing minimum scales and other minimum conditions of employment for said members.

17. By reason of the foregoing, the acts of which plaintiffs complain are immunized from injunctive restraint under the Sherman Act (15 USCA, Sections 1 and 2) by the provisions of the Clayton Act (15 USCA, Section 17; 29 USCA, Section 52).

AS AND FOR A THIRD COMPLETE DEFENSE:

18. Repeat and reiterate each and every allegation set forth in paragraphs "12" and "13" of this answer as if herein more fully and at length set forth.

19. The primary and exclusive jurisdiction to determine the issues of whether the individual plaintiffs are employers and whether defendants are required to bargain collectively with them is vested in the National Labor Relations Board under the National Labor Relations Act as amended (29 USC, Ch. 7).

20. Plaintiffs, recognizing the said jurisdiction of the National Labor Relations Board, on or about March 14, 1960 filed a charge with the said Board against defendant Local 802 (NLRB Case No. 2-CB-2855), alleging that Local 802 was engaging in unfair labor practices within the meaning of Section 8(b)(1) and (3) of the said National Labor Relations Act, in that plaintiffs were employers and Local

802 was refusing to bargain collectively with them as to one part of the aforesaid "price list". The National Labor Relations Board's Regional Director, after a thorough investigation of the facts, refused to issue a complaint "because there is insufficient evidence of any violation of the Act", and, on an appeal taken by plaintiffs, the said ruling was upheld by the Board's General Counsel.

21. In April 1961, the plaintiffs, further recognizing the said jurisdiction of the National Labor Relations Board, filed five separate unfair labor practice charges with the said Board against one or both of the defendant Unions, which charges present the same basic issues of law and fact as are presented in this action, and the said charges are still pending before the said Board.

22. By reason of the foregoing, this Court is pre-empted from jurisdiction to determine the subject matter of this action.

AS AND FOR A FOURTH COMPLETE DEFENSE:

23. The performance of a single musical engagement by plaintiffs or by any other members of the defendant Unions, no matter where performed, is a purely local affair and does not constitute interstate commerce within the meaning of Sections 1 and 2 of the aforesaid Sherman Act.

24. By reason of the foregoing, the acts complained of by plaintiffs cannot and do not constitute violations of the said Sherman Act, and this Court is without jurisdiction over the subject matter of this action.

AS AND FOR A FIFTH COMPLETE DEFENSE:

25. Upon information and belief, the "General Scale Increase for Special Class Club Dates", as set forth in Exhibit "A" annexed to the complaint, are a list of minimum wage scales at which members of defendant Local 802 are ready and willing to perform labor, and that such wage

scales were established, and have been established for more than forty (40) years, by the members of Local 802 themselves.

26. Upon information and belief, the individual plaintiffs had been members of the defendant Unions for more than fifteen years and throughout the said period they accepted the aforesaid minimum wage scales and working conditions and the manner in which they were established and applied.

27. By reason of the foregoing, plaintiffs have been guilty of laches which debar them for any equitable relief such as they seek in this action.

AS AND FOR A SIXTH COMPLETE DEFENSE:

28. Repeat and reiterate each and every allegation set forth in paragraph "25" of this answer, as if herein more fully and at length set forth.

29. The pattern under which defendant Unions operate with respect to single engagements has been set for so many years that the issuance of an injunction at this time would cause more harm to defendant Unions and their thousands of members than it would benefit plaintiffs.

30. By reason of the foregoing, plaintiffs are not entitled to any equitable relief.

AS AND FOR A SEVENTH COMPLETE DEFENSE:

31. Repeat and reiterate each and every allegation set forth in paragraphs "2" and "10" of this answer as if herein more fully and at length set forth.

32. At all times mentioned in the complaint herein, the By-Laws of the American Federation of Musicians have provided and still provide, in Article 8, Sections 1 and 2:

> "Section 1. An appeal can be made to The International Executive Board from any decision, of whatever kind, of a Local or any other authority. A

further appeal can be made to a Convention in any case involving an ultimate fine of $500.00 or more, or expulsion from membership in the Federation, regardless of whether the original decision was made by a Local or by the International Executive Board.

"Section 2. In the event of an appeal to the International Executive Board or to a Convention the appellant may request a stay of judgment from the International President, who shall decide whether or not the appellant is entitled to same."

33. The foregoing provisions of the By-Laws of the American Federation of Musicians have provided and still provide ample and complete remedies for the alleged grievances of the individual plaintiffs who are members of defendant Unions which constitute the basis of their complaint herein.

34. The said individual plaintiffs have not taken or attempted to take the aforesaid appeals as provided in the said By-Laws.

35. By reason of the foregoing, the said individual plaintiffs have instituted and still prosecute this action without having first exhausted the means of redress provided by the said By-Laws of defendant American Federation of Musicians, and they are, therefore, not entitled to any of the relief sought by them in this action.

AS AND FOR AN EIGHTH COMPLETE DEFENSE AS AGAINST PLAINTIFF ASSOCIATION:

36. Plaintiffs Orchestra Leaders of Greater New York, and Charles Turecamo and Joseph Carroll as Treasurer and Secretary thereof have not alleged in the complaint herein that the said plaintiffs in the said capacities have been injured in their business or property by any of the acts alleged to have been committed by defendants, and

the said plaintiffs in the said capacities have not in fact been so injured.

37. By reason of the foregoing, the said plaintiffs have no standing to institute this action under the provisions of the Sherman Act, and are not entitled to the relief sought by them herein.

AS AND FOR A NINTH COMPLETE DEFENSE:

38. Plaintiffs cannot fairly insure the adequate representation of all members of the class for which they presume to bring this action, nor does their complaint herein define the members of the said class who are alleged to be similarly situated as plaintiffs or that the said alleged class does not include persons of hostile, antagonistic or differing interests.

39. By reason of the foregoing, no class action is authorized herein by Rule 23 of the Federal Rules of Civil Procedure.

WHEREFORE, defendant Federation respectfully prays for judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: May 12, 1961.

ASHE & RIFKIN,
Attorneys for
Defendant Federation,
305 Broadway,
New York 7, N. Y.,

By DAVID I. ASHE,
A Member of the Firm.

Plaintiffs' Requests for Admissions

(Tr. pp. 473-487)

[SAME TITLE.]

Plaintiffs request defendants, within thirty (30) days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

I. That the following documents, exhibited with this request, are genuine and are accurately reproduced herewith at the pages indicated:

1. Letter dated January 27, 1960, reproduced in "Appendix to Appellant's Brief", copy of which is supplied herewith (hereinafter called simply "Appendix"), pp. 22a-25a.

2. Plaintiffs' telegram to Herman D. Kenin dated February 9, 1960, reproduced in Appendix, p. 11a, paragraph 17.

3. Letter of Godfrey P. Schmidt to Herman D. Kenin dated February 19, 1960; reproduced in Appendix, pp. 30a-32a.

4. Letter of Herman D. Kenin dated February 19, 1960, reproduced in Appendix, p. 12a, paragraph 18.

5. Letter of Kenin to Schmidt, reproduced in Appendix, p. 12a, paragraph 19.

6. Regulations, reproduced as "Exhibit C" in Appendix, p. 21a.

7. Page 28 of "Allegro", dated June, 1960, copy of which is supplied herewith; it having been referred to in Appendix, p. 43a, paragraph 30, as "Exhibit H".

8. "Exhibit D", reproduced in Appendix, pp. 142a-144a.

9. "Exhibit E", reproduced in Appendix, pp. 144a-145a.

10. "Exhibit F", reproduced in Appendix, pp. 146a-147a.

11. "Exhibit H", reproduced in Appendix, pp. 147a-148a.

12. "Exhibit I", reproduced in Appendix, pp. 149a-164a.

13. "Exhibit M", reproduced in Appendix, p. 183a.

14. "Exhibit N", reproduced in Appendix, pp, 184a-185a.

15. "Exhibit O", reproduced in Appendix, p. 186a.

16. "Exhibit P", reproduced in Appendix, p. 187a.

17. "Exhibit Q", reproduced in Appendix, pp. 188a-189a.

18. "Exhibit R", reproduced in Appendix, pp, 190a-192a.

19. "Exhibit S", reproduced in Appendix, pp. 193a-194a.

20. "Exhibit T", reproduced in Appendix, pp. 195a-196a.

21. "Exhibit X", reproduced in Appendix, p. 199a.

22. "Exhibit Y", reproduced in Appendix, p. 200a.

23. "Exhibit Z", reproduced in Appendix, pp. 201a-202a.

24. Letter dated November 22, 1960, reproduced in Appendix, pp. 160a-161a.

II. That each of the following statements is true:

1. That no other provision (excepting those listed in paragraphs of the complaint in Civil 1169-60 numbered 10, 11, & 13) was made for the involved Welfare Fund by Local 802, its members or officers; (Appendix, p. 9a) and that no further amendments to the By-Laws and Price List had been enacted to the time of the service of complaint in 60 Civil 1169; and that, as alleged in paragraph 14 of the said complaint, no votes of the members at any regular or special meeting of Local 802 or of the Executive Board of Local 802 concerned the Welfare Fund in question until January 12, 1960.

2. That on January 12, 1960, about fifty (50) members of Local 802 in the single engagement field were present at

a meeting called by officers of Local 802 and conducted in the Executive Board Room of said local; that these members had been notified by telephone or word of mouth by various officers of Local 802 of the calling of such meeting; that those present at such meeting were informed by said officers that only about thirty-five (35) orchestra leaders had been asked to attend said meeting; and that no effort had been made at that time to organize a general meeting of orchestra leaders in the single engagement field who are members of Local 802, as alleged in paragraph 14 of the complaint in 60 Civil 1169 (Appendix, p. 9a).

3. That after publication of the "Allegro" dated January 1960, plaintiffs promptly requested defendants, Max Arons and Al Manuti, to withhold adoption of the Welfare Plan until it was worked out in detail; and that this request was denied by said defendants (Appendix, p. 11a).

4. That defendants have failed or refused to negotiate with plaintiffs, or with other orchestra leaders similarly situated, on behalf of sidemen, members of Local 802, represented by the union and employed in orchestras of plaintiffs or of orchestra leaders who are similarly situated.

5. That defendant, Local 802, purports to represent "sidemen" or musicians hired to perform in the bands or orchestras of plaintiffs and those similarly situated.

6. That plaintiffs as orchestra leaders, and other orchestra leaders who are members of Local 802, frequently fulfill single engagements outside of the State of New York.

7. That plaintiffs and the class they represent gross millions of dollars income per year from such engagements in various states of the United States in connection with which they render musical services outside of New York (and pay the 10% travelling surcharge) with the aid of sidemen represented by defendants; that many of the purchasers of such musical services are large corporations engaged in inter-state or foreign commerce; and that side-

men or musicians who play in the orchestras of plaintiffs or the class represented by plaintiffs derive each year hundreds of thousands of dollars in compensation from their rendering musical services in various states of the United States.

8. That defendants, pursuant to long standing union practice and policy, have insisted and do insist that orchestra leaders become and remain members in good standing of Local unions affiliated with defendants.

9. That one of the methods used by defendants to enforce their "prices" and "minimums" is the publication in "Allegro" of notices or advertisements similar to "Exhibits C, D, E, F, & G", annexed to the complaint (paragraph 30) in 60 Civil 2939 (Appendix, p. 43a).

10. That plaintiffs, as orchestra leaders, operate their several businesses independently; have their own usual and occasional clientele; employ sidemen or musicians for particular occasions; direct such sidemen or musicians themselves or assign directors for them; control and discipline the sidemen who perform in their orchestras; conduct all negotiations leading to engagements for their respective orchestras; regulate the style and manner of performance of their orchestras, musicians, who are members of defendant unions, and who assist them in carrying out their engagements; and that such engagements cannot be fulfilled without the assistance of such sidemen or musicians.

11. That the so-called "tax" referred in paragraph 29 of the complaint in 60 Civil 4025 is not and has not been regarded in the accounting and other records of defendants as part of the dues, initiation fees or assessments levied by defendants or any of them; and that said "tax" is imposed upon orchestra leaders (Appendix, p. 72a).

12. That the so-called travelling "surcharge" referred to in paragraph 30 of the complaint in 60 Civil 4025 is not and has not been regarded part of the initiation fees,

dues or assessments levied by defendants or any of them; and that said "surcharge" is imposed upon orchestra leaders (Appendix, p. 72a).

13. That as a matter of common union practice and policy, failure of plaintiffs (or any member of the class represented by the plaintiffs) to collect the aforesaid "tax" and "surcharge" or their failure to disburse them in the manner required by defendants exposed plaintiffs (and said class) to union discipline, charges and penalties.

14. That union discipline (pursuant to the defendants' practice, policy, constitutions and by-laws) may and sometimes does include economic reprisals, including the penalty of being denominated "unfair" or a "defaulter".

15. That plaintiffs and many members of the class represented by plaintiffs were, at the time of the institution of the four complaints reprinted in the "Appendix", members in good standing of defendant unions.

16. That the so-called "Price List" published by defendant, Local 802, fixes the prices which, in more than fifty per cent of the engagements in the single-engagement field, are charged by orchestra leaders (members of Local 802) to their clients; that orchestra leaders expose themselves to union charges if they contract with their clients at prices below the prices appearing in said "Price List"; and that defendants impose upon plaintiffs and the class represented by plaintiffs wage scales, price lists and minimums without collective bargaining agreement.

17. That when orchestra leaders are expelled from membership in defendant labor organization, the latter publish in "Allegro" and by other means, news of such expulsion; and that, in that connection, they warn members of defendant labor organizations that such members will be subject to union charges and penalties if they perform engagements for such expelled orchestra leaders.

18. That defendants or local unions affiliated with defendants have, since institution of the four Civil Actions set forth in the "Appendix", filed charges against and in some cases imposed penalties on orchestra leaders because of their failure to comply with union regulations and practices challenged as illegal in the said four complaints; and that among these orchestra leaders were Ben Cutler, Joe Basile, Howard Lanin, Joseph Carroll, Charles Peterson and others.

19. That plaintiffs (and the class of orchestra leaders represented by plaintiffs) subject themselves to intra-union charges and penalties by failing to comply with the rules set forth in a booklet entitled "Single Engagement Minimums", which was annexed as "Exhibit J" to the joint affidavit of Joseph Carroll and Charles Peterson, sworn to on March 21, 1961, and reproduced in the "Appendix", pp. 117a-142a.

20. That as a result of interstate travel by orchestras or by side-men who play for plaintiffs and the class represented by plaintiffs, defendant, American Federation of Musicians, derives an income of three to four millions of dollars per year from the so-called "travelling surcharge".

21. That there was no union meeting or membership meeting and no prior notice to orchestra leaders concerning the promulgation of the prices published in "Allegro" for December 1960; and that the sudden use of the term "wages", or "wage scales" in that publication constituted a deviation from former practice of defendants who had theretofore exclusively used the words "prices" where the union now (since institution of plaintiffs' actions) uses "wages" or "wage scales".

22. That the new prices, wages or wage scales published in "Allegro" for December, 1960, were imposed upon the membership by decision of the officers or executive board of defendant, Local 802, without any action by its membership.

23. That paragraph #29, p. 134a, of the Appendix sets forth an accurate comparison between prices or wages required by defendant, Local 802, before and immediately after promulgation of the involved notice in an issue of "Allegro" and that the percentage of increase set forth in said paragraph #29 is accurate.

24. That orchestra leader Al Gentile of 21 Parkmore St., New Britain, Connecticut was expelled from membership in Local 285, affiliated with defendant, American Federation of Musicians of the United States and Canada, for failure to pay the ten percent "travelling surcharge" (pp. 138a-139a, paragraph 35(a) of the Appendix).

25. That orchestra leader Richard Petrycki of 3144 Lincoln Avenue, Oceanside, N.Y. was notified by defendant, Local 802, that upon motion made by the Executive Board of the Local, his membership in said Local had been terminated because of his failure to pay the two-percent "tax", whose legality is challenged in 60 Civil 4025.

26. That orchestra leader Eddy Dell (Dmuchowsky) of 137 Russell Street, Brooklyn, N. Y., was notified by defendant, American Federation of Musicians of the United States and Canada, that he was in default in payment of the ten percent "travelling surcharge" to Local 562, affiliated with said International Union; and that said International Organization imposed upon the said Eddy Dell a substantial fine and threatened the said Eddy Dell with expulsion from the American Federation of Musicians unless the fine and "tax" were paid by a certain date.

27. That defendant, Herman D. Kenin, telephoned to the President of Local 77, Mr. Musumeci, in the latter part of 1960, and stated the following as the opinion of Henry Kaiser, one of the attorneys for defendant, American Federation of Musicians of the United States and Canada: "Individual leaders who comply with the Schmidt opinion are to be told by the locals involved in the most explicit

terms that the Federation's laws are not subject to interpretation by anti-labor attorneys and said laws will be vigorously enforced"; and that this "opinion" of Mr. Kaiser applied to the ten percent "travelling surcharge" as well as to the so-called "tax" imposed by various locals affiliated with said International Organization with the latter's approval.

28. That defendants and their affiliated local unions comply with the following policy which has been exemplified on numerous occasions by defendant's practice: If, at any time, the evidence is conclusive to the International Organization that the contract for an engagement entered into by a member orchestra leader does not conform with the union prices or conditions, then the said International Organization (The American Federation of Musicians of the United States and Canada) orders or has the right, under union rules, to order, its members not to play such engagements; and that their refusal to comply with such Union order constitutes their resignation from membership in the Local Union to which they belong.

29. That whenever any person, persons, organization or establishment is declared to be on the national "unfair" or "defaulter" list by defendant, American Federation of Musicians of the United States and Canada, members of said International and of its affiliated unions may not (under union rules and practice) render service to such person, persons, organization or for or in such establishment.

30. That no member of defendant, American Federation of Musicians of the United States and Canada, or of any of its affiliated local unions is permitted by defendants to play with any suspended or expelled members or with non-members, unless it be with the consent of the Federation or; in cases wherein the laws of the Federation otherwise provide; and that such consent is often or generally refused.

31. That no orchestra leader or orchestra comprising members of the defendant, International Organization, is permitted by defendants to render services (for any function in any jurisdiction) with non-members without the permission of the involved local executive board or duly authorized official of said local; and that such permission is often or generally refused.

32. That ordinarily no person is permitted by defendants to use any kind of musical instrument or device in the rendition of musical service for an orchestra leader (member of defendant union) unless he or she holds a membership card in the American Federation of Musicians or in one of its affiliated locals.

33. That orchestra leaders and sidemen who are members of defendant, American Federation of Musicians, are not permitted by defendants to sign any form of contract or agreement other than the type issued by defendant American Federation of Musicians or one of its Locals; and that the penalty for violation of this union rule or practice is a fine of not less than one hundred (100) dollars.

34. That no member of defendant, American Federation of Musicians, is permitted by defendants' rules and practice to accept an engagement to join a travelling band or orchestra from a non-member; and that no member of said Federation is permitted by defendants' rules and practice to negotiate with a non-member for such engagement.

35. That orchestra leaders or bands, playing travelling or miscellaneous, out-of-town engagements, are not permitted by defendants' rules or practice to employ any person except a member in good standing of the Federation; and that a fine of five hundred (500) dollars may be imposed upon any member for violation of this union rule.

36. That all contracts of any character or nature for the rendition of musical services are, pursuant to defendants' rules and practices, subject to all existing and future

provisions of the Constitution, By-Laws and Regulations of defendant, American Federation of Musicians of the United States and Canada.

37. That sidemen who are members of defendant labor unions, regardless of the provisions in their contract of employment, are prevented or may be prevented according to defendants' "laws" and practices from rendering service under such contract by reason of any ban, unfair list, order or requirement of defendant, American Federation of Musicians of the United States and Canada.

38. That the price named in all contracts for the employment of orchestras signed by orchestra leaders with their clients must at least be that of the Local or Federation as the case be, having jurisdiction under defendants' rules and practice.

39. That defendants make binding union provisions or regulations for the minimum prices which must be charged by orchestra leaders to their clients for travelling theatrical engagements.

40. That it is regarded by defendants as a violation of union rules and as detrimental to the welfare of defendant labor unions for a member whether leader or sidemen to perform in or with a band or orchestra advertised under, or which bears the name of, a non-member without the consent of the executive board; and that such consent is often or generally refused.

41. That it is regarded by defendants as a violation of union rules and as detrimental to the welfare labor unions for a member to engage or assist in engaging or to advise or permit anyone else to engage or assist in engaging any musician who is not a member of a local affiliated with defendants.

42. That it is regarded by defendant as a violation of union rules and as detrimental to the welfare of defendant

labor unions for a member to accept engagement from any musician who is not a member of a local affiliated with defendant, American Federation of Musicians of the United States and Canada.

43. That it is regarded by defendants as a violation of union rules and as detrimental to the welfare of defendant labor unions for any member to engage or perform with a member who is not in good standing with a local affiliated with defendant, American Federation of Musicians of the United States and Canada.

44. The defendants regard orchestra leaders as responsible for the good standing of each and every member in the employ of such orchestra leaders.

45. That no engagement or employment as an orchestra leader is regarded by defendants as effective or as properly recognized by any member of defendant unions unless it is first approved by the executive board having jurisdiction.

46. That defendants regard orchestra leaders as "personnel managers" and not as employers.

47. That while defendants have constantly refused to allow plaintiffs (or the class of orchestra leaders represented by plaintiffs) to engage or to work with non-members, defendants tolerated or permitted numerous bands to participate in the Labor Day Parade for 1961 without objection to their status as non-members; and they tolerated or permitted union members to play with non-members in many individual bands which participated in said Parade.

48. That defendants, by union practice and regulation, regularly limit the right of orchestra leaders to discipline sidemen by insisting that defendant unions alone have the right to make final decisions respecting enforcement of discipline in their orchestras.

49. The defendants do not permit impartial outside arbitration in the single engagement field; that they insist on

processing grievances presented by sidemen and by orchestra leaders before union tribunals, which purport to have the sole right to make final decisions on such matters; and said tribunals often draw up charges, investigate them, hear evidence on such charges and make decision on them.

50. That with approval of defendant, American Federation of Musicians, local unions affiliated with its unilaterally exercise the power to invalidate or modify contracts between orchestra leaders and clients by raising the prices therein specified for orchestra engagements; and that thereafter (as for example in the Philadelphia Local #77) for all similar engagements, the raised prices must, by union "law", be inserted in such contracts.

Defendants' Answers to Request for Admissions

[Same Title.]

The request of plaintiffs for admissions pursuant to Rule 36 of the Federal Rules of Civil Procedure contains certain items which relate to both the defendant American Federation of Musicians (hereinafter called the "Federation") and the defendant Associated Musicians of Greater New York Local 802 (hereinafter called "Local 802") while others relate only to one or the other of these defendants. Accordingly, where one of the defendants has not answered a specific item, it is not an admission of the item on its part, but is due to the fact that the inquiry was directed to the answering defendant.

Upon information and belief, defendants respond as follows to plaintiffs' request:

1. As to items I-1, 2, 3, 4 and 5 of said request, defendant Federation admits that the copies of documents furnished by plaintiffs with said request are true copies of the originals thereof.

2. As to items I-6, 7, 9, 10, 11, 13, 14, 15, 17 and 20 of said request, defendant Local 802 admits that the copies of documents furnished by plaintiffs with said request are true copies of the originals thereof.

2a. As to items I-18, 19, 21, 22 and 23 of said request, the defendants admit that the copies of documents furnished by plaintiffs with said request are true copies of the originals thereof.

3. As to item I-8 of said request, defendant Local 802 denies that the copy of charges against Charles Peterson, dated February 20, 1961, furnished by plaintiffs with said request is a true copy of the original thereof.

4. As to item I-12 of said request, defendants cannot truthfully admit or deny the genuineness of the document referred to because such document purports to be a transcript of a trial proceeding conducted by a union which is not a party to this case. Defendants also state that whether or not such document is genuine, it is inadmissible in evidence because such proceeding was conducted by a union concerning a person neither of whom is a party to these actions.

5. As to item I-16 of said request, defendants cannot truthfully admit or deny the genuineness of the document referred to because defendants lack knowledge or information sufficient to form a belief as to whether or not such document was sent to and received by plaintiff Peterson. Defendants also state that whether or not such document is genuine, it is inadmissible in evidence because it is irrelevant, immaterial and incompetent.

6. As to item I-24 of said request, defendants cannot truthfully admit or deny the genuineness of the document referred to because defendants lack knowledge or information sufficient to form a belief as to whether or not such document was sent by plaintiffs' attorney, Godfrey P. Schmidt, Esq. Defendants also state that whether or not

such document is genuine, it is inadmissible in evidence because such document was sent by and to persons not parties to these actions.

7. As to item II(1) of said request, defendant Local 802 denies said statement.

8. As to item II(2) of said request, defendant Local 802 denies said statement.

9. As to item II(3) of said request, defendant Local 802 admits said statement.

10. As to item II(4) of said request, defendants deny that they have refused to negotiate with plaintiffs. Defendants also deny so much of said statement which states or implies that sidemen are employed by plaintiffs or by other orchestra leaders.

11. As to item II(5) of said request, defendants deny so much of said statement which states or implies that sidemen are employed by plaintiffs or by other orchestra leaders.

12. As to item II(6) of said request, defendants deny said statement.

13. As to item II(7) of said request, defendants deny said statement.

14. As to item II(8) of said request, defendants deny that they have insisted and do insist that orchestra leaders become and remain members in good standing of Local unions affiliated with defendants except when such membership is permitted by applicable law.

15. As to item II(9) of said request, defendant Local 802 denies said statement.

16. As to item II(10) of said request, defendants deny so much of said statement which states or implies that sidemen or musicians are employed by plaintiffs, and which

states or implies that plaintiffs direct, control and discipline sidemen or musicians or regulate the style and manner of performance, other than in the capacity of orchestra conductors. Because defendants lack knowledge or information sufficient to form a belief thereof, defendants cannot truthfully admit or deny so much of the statement which states that plaintiffs, as orchestra leaders, operate their several businesses independently; conduct all negotiations leading to engagements; have their own usual and occasional clientele.

17. As to item II(11) of said request, defendant Local 802 denies that the said "tax" is not and has not been regarded as part of the dues, initiation fees or assessments of said defendant.

18. As to item II(12) of said request, defendants deny that said "surcharge" is not and has not been regarded as part of the dues, initiation fees or assessments of defendant unions.

19. As to item II(13) of said request, defendants deny that plaintiffs represent members of a class.

20. As to item II(14) of said request, defendants admit only so much of said statement which states that union discipline (pursuant to defendants' practice, policy, constitutions and by-laws) may and sometimes does include being denominated "unfair" or a "defaulter", and defendants deny the remainder of said statement.

21. As to item II(15) of said request, defendants deny that plaintiffs represent members of a class.

22. As to item II(16) of said request, defendant Local 802 denies said statement.

23. As to item II(17) of said request, defendant Local 802 denies so much of said statement which states or implies that sidemen are employed by plaintiffs or by other orchestra leaders.

24. As to item II(18) of said request, defendants state that whether or not said statement is true, so much thereof as relates to actions taken by persons and unions who are not parties to these cases is inadmissible because of irrelevancy.

25. As to item II(19) of said request, defendants deny that plaintiffs represent members of a class.

26. As to item II(20) of said request, defendant Federation denies said statement.

27. As to item II(21) of said request, defendant Local 802 denies so much of the statement as states that there was no prior notice to orchestra leaders concerning the promulgation of the prices published in the December, 1960, issue of "Allegro", that the use of the terms "wages" or "wage scales" was sudden, and that the defendants had theretofore exclusively used the word "prices" where the union now uses "wages" or "wage scales".

28. As to item II(22) of said request, defendant Local 802 denies said statement.

29. As to item II(23) of said request, defendant Local 802 denies said statement.

30. As to item II(24) of said request, defendant Federation denies said statement. Defendants also state that whether or not said statement is true, it is inadmissible in evidence because it is irrelevant since it relates to a person not a party to these actions.

31. As to item II(25) of said request, defendant Local 802 denies said statement.

32. As to item II(26) of said request, defendants state that whether or not said statement is true, it is inadmissible in evidence because it relates to a person not a party to these actions.

33. As to item II(27) of said request, defendant Federation denies said statement. Defendants also state that whether or not said statement is true, it is inadmissible in evidence because it is irrelevant, immaterial and incompetent.

34. As to item II(28) of said request, defendants deny said statement.

35. As to item II(29) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

36. As to item II(30) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

37. As to item II(31) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

38. As to item II(32) of said request, defendants deny the truth of the statements except in situations where permitted by applicable laws.

39. As to item II(33) of said request, defendants deny said statement.

40. As to item II(34) of said request, defendants deny the truth of the statement except in situations where permitted by applicable laws.

41. As to item II(35) of said request, defendants deny the truth of the statement except in situations permitted by applicable laws.

42. As to item II(36) of said request, defendants deny the statement.

43. As to item II(37) of said request, defendants deny the statement except in situations permitted by applicable laws.

44. As to item II(38) of said request, defendants deny so much of the statement as states or implies that employers of orchestras are not employers of the leaders, musicians and sidemen in said orchestra.

45. As to item II(39) of said request, defendants deny so much of the statement as states or implies that employers of orchestras are not employers of leaders, musicians and sidemen in said orchestras. Defendants also state that whether or not such statement is true, it is inadmissible in evidence because it is irrelevant.

46. As to item II(40) of said request, defendants deny the statement except in situations permitted by applicable law.

47. As to item II(41) of said request, defendants deny the statement except in situations permitted by applicable law. Defendants also deny so much of said statement as states or implies that leaders or musicians employ other musicians in performing musical services.

48. As to item II(42) of said request, defendants deny the statement except in situations permitted by applicable law. Defendants also deny so much of said statement as states or implies that leaders or musicians employ other musicians in performing musical services.

49. As to item II(43) of said request, defendants deny the statement except in situations permitted by applicable law. Defendants also deny so much of said statement as states or implies that leaders or musicians employ other musicians in performing musical services.

50. As to item II(44) of said request, defendants deny the statement.

51. As to item II(45) of said request, defendants deny said statement.

51a. As to item II(46) of said request, defendants admit said statement.

52. As to item II(47) of said request, defendants deny that plaintiffs represent a class, and so much of said statement as states or implies that plaintiffs employ musicians and sidemen.

53. As to item II(48) of said statement, defendants deny the statement.

54. As to item II(49) defendants deny so much of said statement as states or implies that defendants' grievance processing procedures are not impartial.

55. As to item II(50) of said statement, defendants deny said statement.

Dated, New York, N.Y.
January 9th, 1962.

(Verified.)

ASHE & RIFKIN,
Attorneys for Defendants,
305 Broadway,
New York 7, N. Y.

Plaintiffs' Exhibit 388

6. Defendants do not permit orchestra leaders (who are Union members) the discretion to decide whether the services of such orchestra leaders and their orchestras may be rendered *gratis* for a particular client, for the sake of *charity* or for the sake of *prestige* of the orchestra leader and his orchestra or for any other reason. The orchestra leader *must* charge the *minimum* "price of the engagement."

3. Defendants deny the statements contained in paragraph 6 of the request, except admit that under the provisions of the constitution and by-laws of defendant unions, in the absence of waiver by the Executive Board of the

unions, the purchaser of the music must pay to members of Local 802 not less than applicable minimum wages.

13. An orchestra leader like Carroll, Cutler or Peterson, who belong to defendant unions and who is asked by a client to quote the price for an engagement, must include the following items which together constitute the minimum "price of an engagement":

A. The *rate for the engagement* as classified by defendant unions in *Class A* or *Special Class* as defined in the Local 802 Minimum Book (formerly the Minimum Book defined three classes: A, B, and C).

B. *The minimum number of musicians* required by defendants for the particular room or place of the engagement as also fixed in the Local 802 Minimum Book.

C. The *minimum scale of wages* for the sidemen involved as determined in defendants' Price List. This scale varies according to the following factors also defined in said Price List or in By-laws:

(1) The *type of the engagement.*

(2) The *number of hours* of playing required by the client (overtime rates).

(3) *Whether the sideman doubles,* i.e., whether he plays more than one instrument.

(4) Whether the engagement is for *continuous* or *non-continuous* playing.

(5) Whether there are to be *rehearsals* or not.

(6) Whether there is to be a *show lasting more than 20 minutes.*

D. The *minimum "leader's fee"* or "leader money."

E. The *minimum mileage fees* or charges fixed by defendants.

F. The *8% price addendum* (formerly 7%) required by the Price List for the leaders' social security expenses.

G. Minimum *cartage charges,* where there is cartage.

H. The *cost of uniforms,* where uniforms are required.

I. The *cost of transportation,* where there is transportation.

J. The *cost of food and lodging,* where required.

K. The *10% traveling surcharge* where the engagement is played outside of the home local's jurisdiction.

4. Defendants deny the statements contained in paragraph 13 of the request, except admit that members of the Federation, when asked by a purchaser to quote the cost of the music to the purchaser for an engagement in Local 802's jurisdiction, must quote a minimum sum which must be based upon the factors set forth in sub-paragraphs A, B, C, E, G, I, J and K of paragraph 13 plus the minimum wages payable to the leaders plus 8% of the minimum wages to cover social security expenses.

19. The International Executive Board of AFM exercises supervision over the Price Lists of all of its locals; and it has the right, if it finds that the Price List in force in any Local is detrimental to any other locals of the Federation, to adjust the objectionable provisions of said Price List.

5. Defendants deny the statements contained in paragraph 19 of the request, except admit that the by-laws of the Federation provide as follows (Art. 1, § 5-P):

> "The Board shall exercise a supervision over the price list of all Locals, and upon finding that the price list in force in any Local is detrimental to other Locals of the Federation, it shall be empowered to adjust the objectionable sections of said price list."

Defendants further admit that the International Executive Board, on rare occasions, has exercised such supervision over the price lists of locals of the Federation.

20. The local secretary of each AFM local regularly sends to each local secretary within a radius of 100 miles a local Price List of general business, and minimum book, if any.

6. Defendants deny the statements contained in paragraph 20, except admit that the Secretary of Local 802 periodically sends to each local secretary located within a radius of 100 miles of Columbus Circle, New York City, N. Y., a Price List and Minimum Book.

25. The *Allegro* for March, 1960, printed the proposals of amendment of the Price List to be submitted to the annual Price List meeting of Monday, April 18, 1960, 3:00 P.M. at Palm Gardens. No quorum gathered at that Price List Meeting. As a result, action was taken by the Executive Board on the proposed Price List resolutions. *Allegro* for May, 1960, printed the action taken by the Executive Board on Price List resolutions.

8. Defendants admit the statements contained in paragraph 25 of the request.

48. Traveling orchestras which establish headquarters in the jurisdiction of any local are not permitted to compete for or accept and play engagements in said jurisdiction.

11. Defendants deny the statements contained in paragraph 48 of the request, except admit that the by-laws of the Federation provide that members of traveling orchestras which play engagements at hotels, cafes, inns, clubs, dance halls, etc., and which establish headquarters in the jurisdiction of any local, in which they are not members, are not permitted to accept engagements in that jurisdiction (Art. 17, § 23).

53. A traveling band engaged in a summer resort is restricted by defendants to services for such summer resort

only. Such services may not include the playing of theatrical engagements, picnics or any other miscellaneous engagements, unless the local in whose jurisdiction the engagement is played gives its consent, and such consent is rarely given.

13. Defendants deny the statements contained in paragraph 53 of the request, except admit that Article 17 of the by-laws of the Federation provides:

[Entire (13 line) quote omitted from original.]

63. Defendants permit no competition for engagements between orchestra leaders at prices below the minimum "prices of engagements" fixed in the said Price Lists and/or other Union "laws".

14. Defendants deny the statements contained in paragraph 63 of the request, except admit that under the by-laws of defendants, the purchaser of the music must pay not less than the applicable minimum wages to the members of Local 802 engaged.

66. Under defendants' rules and practice, no orchestra leader is permitted (nor is his agent permitted) to solicit a future engagement at a hotel, nightclub or other steady engagement where another orchestra leader (and his band) is engaged unless the latter has received a notice of termination of his engagement; and orchestra leaders who solicit in violation of this rule are subject to Union charges and discipline.

15. Defendants deny the statements contained in paragraph 66 of the request, except admit that the by-laws of Local 802 prohibit its members from soliciting "any steady engagement for any place where the orchestra or members then employed have not received proper notice terminating their engagement" (Art. IV, § 1(z)).

85. An orchestra leader must, before an engagement is played, inform the local in whose jurisdiction the engage-

ment is played, of the amount collected for transportation charges and of the point from which the transportation charges are made, and the exact and correct amount of percentage which will be paid to an agent, or agents as compensation for booking the engagement. He must also notify the local secretary of the termination of the engagement, the use of the option, or voiding of the option on the contract. If any engagement of a traveling orchestra is postponed or cancelled, the leader or the booker must notify the local immediately.

17. Defendants deny the statements contained in paragraph 85 of the request, except admit that the Federation's by-laws contain reporting requirements similar to those referred to in paragraph 85 of the request for traveling engagements played by its members in hotels, cafes, inns, clubs, dance halls, and the like (Art. 17, § 2).

90. Annexed hereto, marked EXHIBIT "E" to form part of this document is a communication addressed by AFM to all AFM Booking agents.

EXHIBIT "E"

AMERICAN FEDERATION OF MUSICIANS
OF THE UNITED STATES AND CANADA

Affiliated with the A.F.L.-C.I.O.

Office of the President
425 Park Avenue
New York 22, N. Y.

July 12, 1962

To All A.F.M. Licensed Booking Agents:

Dear Sirs:

We refer to the License Agreement between you and us pursuant to which you act as booking agent for members of the American Federation of Musicians.

The International Executive Board of the Federation has approved amendment of that agreement by the addition of new paragraphs NINTH and TENTH the text of which is enclosed. The present paragraphs NINTH and TENTH will be renumbered as paragraphs ELEVENTH and TWELFTH.

You are requested immediately to sign and return the enclosed letter to us in the enclosed self-addresed envelope, which will constitute an amendment to your License Agreement effective as of July 1, 1962.

Sincerely yours,

HERMAN KENIN
President

HDK:
Enc.

July 12, 1962

American Federation of Musicians
425 Park Avenue
New York, N. Y.

Dear Sirs:

We refer to the License Agreement between you and us pursuant to which we act as booking agent for members of the American Federation of Musicians.

We agree to the amendment of said License Agreement effective July 1, 1962, as follows:

The following is hereby added thereto as paragraphs NINTH and TENTH:

"NINTH: (A) Every claim by a Licensee against a member of the Federation shall be submitted for determination as provided in Article 9 of the Federation's By-Laws.

(B) No claim based on an event occurring before June 30, 1962, shall be enforceable unless submitted for such determination by January 1, 1963, except as provided in (D) or (E) below.

(C) No claim based on an event occurring on or after June 30, 1962, shall be enforceable unless submitted for such determination within two (2) years following such event, except as provided in (D) or (E) below.

(D) The written acknowledgment of any claim dated and signed by the member against whom such claim is asserted shall extend the time in which such claim may be submitted for determination for a period of two (2) years following the date of such acknowledgment.

(E) The delivery of a statement of account to the member and the failure of the member to object

thereto within the time therein prescribed, as provided in TENTH below, shall extend the time in which any claim specified in such statement of account may be submitted for determination for a period of two (2) years following the date of mailing of such statement of account.

TENTH: The statement of account referred to in NINTH (E) above shall comply with all of the following requirements:

(A) Such statement of account shall be rendered to the member at least once in each twelve (12) months period either during the term of the agreement between the Licensee and the member, or since January 1, 1962.

(B) Such statement of account shall be in reasonable form and detail sufficient to inform the recipient of (i) each receipt by Licensee in connection with performances by the member since the date of the last such statement and the places and dates of such performances; (ii) each disbursement made by the Licensee to or on behalf of the member, including commissions retained by the Licensee, since the date of the last such statement; and (iii) the net amount owed by the Licensee to the member or by the member to the Licensee as of the date of such statement.

(C) Such statement of account shall be deemed to have been duly delivered, if mailed by certified or registered mail, return receipt requested, addressed to the member at the address last filed by such member with Licensee.

(D) Such statement of account shall state prominently that objection to any item therein contained shall be made in writing within a stated time which, in no event, shall be less than sixty (60) days following the date of mailing such statement.

(E) Copies of such statements of account shall be filed with the Office of the President of the Federation concurrently with the delivery thereof to the member."

The presently numbered paragraphs NINTH and TENTH of said agreement are renumbered ELEVENTH and TWELFTH.

Very truly yours,

__ _____

Name of Booking Agent

By _____

Authorized Officer

_____

Address

18. Defendants admit the statements contained in paragraph 90 of the request.

94. AFM refuses to issue licenses or permits to Bookers, Agents, Representatives and Managers of orchestras or bands (such as those of Carroll, Cutler and Peterson) unless the AFM form of license is executed by such persons.

19. Defendants deny the statements contained in paragraph 94 of the request, except admit that Federation refuses to issue licenses or permits to bookers, agents, representatives and managers of orchestras or bands unless Federation's form of license is executed by such persons.

110. Orchestra leaders like Cutler, Carroll and Peterson are forbidden, once they cease being members in good standing in defendant Unions, from playing their own instruments and from conducting or otherwise participating in the activities of their own orchestras, as is their professional custom and essential asset; and defendants enforce this policy by making Union sidemen unavailable to orchestra leaders as soon as they lose such good standing.

21. Defendants deny the statements contained in paragraph 110 of the request, except admit that under the by-laws of defendant unions, no member of defendant unions is permitted to perform services with a non-member unless approval of either or both of the defendant unions is given (Federation by-laws, Art. 13, § 5; Local 802 by-laws, Art. IV, § 1 (v)).

121. All contracts between orchestra leaders and their clients must comply with the By-laws and other regulations, including Price Lists and Minimums requirements of defendant Unions; otherwise such contracts will not be approved by defendant Unions.

23. Defendants deny the statements contained in paragraph 121 of the request, except admit that contracts between purchasers of music and orchestra leaders who are members of the defendant unions must comply with the constitution and by-laws and regulations of defendant unions.

122. Every agreement or contract relating to performance of musical services by an AFM member is required by defendants to include a provision reading:

> "If any * * * grievance [which is defined as every claim, controversy, dispute or difference, arising out of or relating to the interpretation or application of the contract] involves or relates to booking agents, traveling bands, recording, radio, or television activities, or any other matter within the sole competence of the Federation, pursuant to its constitution, bylaws, rules or resolutions, as distinguished from matters within the competence of the local thereof, it shall be adjudicated and determined only by the International Executive Board of said Federation * * *".

24. Defendants deny the statements contained in paragraph 122 of the request, except admit that under the Federation by-laws, every agreement or contract relating to

the performance of musical services by a Federation member is deemed to include the following provision (Art. 9, § 6):

"(A) Every claim, dispute, controversy or difference (all of which are herein called 'grievance') arising out of, dealing with, relating to, or affecting the interpretation or application of this contract or the violation or breach or threatened violation or breach thereof, whether between (1) an employee who is a member of the American Federation of Musicians (herein called 'Federation') and the employer or purchaser of services hereunder, (2) such member and the booking agent of the engagement provided for hereunder, (3) such employer or purchaser and such booking agent, or (4) two or more booking agents shall be heard, adjudicated and determined as follows:

"(1) If any such grievance involves or relates to booking agents, traveling bands, recording, radio or television activities, or any other matter within the sole competence of the Federation pursuant to its Constitution, Bylaws, rules or resolutions, or distinguished from matters within the competence of the locals thereof, it shall be adjudicated and determined only by the International Executive Board of said Federation (herein called 'Board').

"(2) Any other such grievance shall be initially adjudicated by the person, persons or body specified by the rules, Bylaws or practices of the Local of said Federation in whose jurisdiction the services have been or are to be performed, in accordance with the procedures adopted in such rules or By-laws or adhered to under such practices. Any party to such local adjudication may appeal from determination thereof to the Board within thirty days from the date on which such party is notified of such local determination or

within such additional time as the President of the Federation or the Board may specify. On such appeal, the Board shall receive the evidence taken by such local person, persons or body and, in its discretion, may receive additional evidence from any party. Pending such appeal, the President of the Federation may stay the award on such terms and conditions as may be deemed proper, including but not limited to the deposit of adequate security with the Federation.

"(3) The award of the Board on any grievance submitted to it in accordance herewith, whether in the first instance or on appeal from the decision of such local person, persons or body shall be final and binding upon all parties. The award of such local person, persons or body in any adjudication from which an appeal is not taken to the Board as above provided shall be final and binding upon all parties."

125. Defendants now maintain such control over orchestra leaders who function as do Cutler, Carroll or Peterson, that they claim and exercise the right, under Unions "laws", to require such orchestra leaders to produce for Union inspection, records of all engagements contracted or performed by orchestra leaders together with listings of all personnel and all payments for such engagements including total contract price, wages and expenses.

25. Defendants deny the statements contained in paragraph 125 of the request, except admit that defendant unions may require their members to produce for their inspection, records of engagements contracted for or performed by such union members, together with a listing and names of sidemen, the payment by the purchaser of the music for engagements, and the wages paid to each of the musicians performing the engagement.

148. Defendant Unions require from orchestra leaders who wish to make recordings of the performances of their orchestras, an AFM license to make such recordings.

26. Defendants deny the statements contained in paragraph 148 of the request, except admit that in the vast majority of cases orchestra leaders who are members of defendant unions and who desire to make their own recordings of the performances of their orchestras, are required by Federation to procure a Federation phonograph record agreement to make the recording.

151. The By-laws (Edition as of October 23, 1962) of Local 802 impose on all orchestra leaders and their clients minimum prices of engagements in the following pages and paragraphs, all taken from Article IV of said By-laws:

(a) p. 37 par. "(k)"
(b) p. 38 par. "(n)"
(c) p. 38 par. "(o)"
(d) p. 38 par. "(p)"
(e) p. 39 par. "(t)"
(f) p. 39 par. "(u)"

27. Defendants deny the statements contained in paragraph 151 of the request, except admit that, in the absence of waiver by the Executive Board of the unions, members of Local 802 must receive not less than the applicable minimum wage for an engagement; and further admit that the by-laws of Local 802 contain the provisions cited in said paragraph 151.

157. The Local 802 Price Lists apply worldwide, wherever members of that Local comprise the orchestra. They also apply when orchestras of other AFM Locals play within the jurisdiction of Local 802, as do the Local 802 minimum-number-of-musicians regulations.

29. Defendants deny the statements contained in paragraph 157 of the request, except admit that all orchestras composed of members of the Federation, who perform services within the jurisdiction of Local 802, must comply with the minimum wage and minimum number of men requirements of Local 802.

156. Included in the minimum union price of the engagement is the minimum income or compensation which, under union rules, the orchestra leader must derive from the engagement. This minimum income or compensation includes the leader's fee and the 8% surcharge. Here are some examples of such minimum leader's income or compensation for orchestra comprising *six* musicians, playing on a non-continuous basis:

Sundays & Weekdays	*Saturdays* (nights)
$53.76 for 1-3 hours (dinner music only—no dancing)	$81.92 for 1-4 hours
$71.68 for 4 hours	
$89.60 for 5 hours	$102.40 for 5 hours
$107.52 for 6 hours	$122.88 for 6 hours

Here are examples of minimum leaders income or compensation enforced by defendants, for orchestras comprising *twelve* musicians on a non-continuous basis:

Sundays & Weekdays	*Saturdays* (nights)
$63.84 for 1-3 hours (dinner music only—no dancing)	$97.28 for 1-4 hours
$85.12 for 4 hours	
$106.40 for 5 hours	$121.60 for 5 hours
$127.68 for 6 hours	$145.92 for 6 hours

An orchestra leader, member of defendant unions, would be subject to union charges if he agreed with his client to forego any part of the income or compensation listed above.

28. Defendants deny the statements contained in paragraph 156 of the request, except admit that defendant unions prohibit their members (including leaders) from rendering musical services at wages below those established by defendant unions; that the amounts set forth in paragraph 156 of the request constitute the wage scale of

orchestra leaders who are members of Local 802 for the times and under the circumstances specified, and that a member of Local 802 would be subject to charges if he waived any part of said wages.

167. Under A.F.M. pricing and minimums policy and practice in New York City, the minimum price of a dinner engagement (no dancing) in the main ballroom of the following hotels must be computed upon the basis of an orchestra whose size is at least 50% of the number appearing alongside the name of the hotel:

Astor—12	Roosevelt—10
Biltmore—10	St. George, Brooklyn—12
Commodore—12	St. Regis Roof—8
Essex House—8	Savoy Hilton—6
Park Lane—7	Sheraton East—10
Pierre—10	Statler Hilton—12
Plaza—10	Waldorf-Astoria—12

In all other hotels in New York City, no minimum is fixed for use of the main ballroom for any dinner engagement (no dancing).

30. Defendants deny the statements in paragraph 167 of the request, except defendant Local 802 admits that the minimum wages for its members for dinner engagements (no dancing) in the main ballroom of the hotels referred to must be computed upon the basis of an orchestra whose size is at least fifty percent of the number appearing alongside the name of the hotels referred to in said paragraph 167; and that in all other hotels in New York City no minimum is fixed for use of the main ballroom for dinner engagements (no dancing).

State of New York }
County of New York } ss.:

Max L. Arons, being duly sworn, deposes and says:

That he is Secretary of defendant Associated Musicians of Greater New York, Local 802 ("Local 802") of the defendant American Federation of Musicians of the United States and Canada ("Federation"); that he is one of the defendants herein; that Local 802 and the Federation and various officers of Local 802 and the Federation are the defendants in this action; that all of the defendants are united in interest and are answering together those provisions of plaintiffs' request for admissions dated March 15, 1963 which defendants have been required to answer; that this verification is made on behalf of all of the defendants; that he has read the foregoing answer to the requests for admissions ("the answer") and knows the contents thereof; that he is acquainted with the facts upon which the answer is based; that the answer, upon information and belief, is true.

MAX L. ARONS

Sworn to before me September 12, 1963.

HERBERT D. SCHWARTZMAN

Excerpts from Deposition of Alfred J. Manuti, President of Local 802, Taken February 1, 1962 (Plaintiffs' Exhibit 386)

[p. 114] Q. I refer to Item No. 8 there on the same page. Isn't it true, Mr. Manuti, that your union does insist that orchestra leaders become and remain members in good standing if they are to have members of your union play for them as sidemen? A. Yes, sir.

Q. If an orchestra leader charges his client less than the amount set forth in the price list, he violates your union by-laws, does he not? A. If he charges less than our minimum rates, he [p. 115] would be in violation of our by-laws.

Q. What does your union do to enforce obedience to your by-laws with respect to minimums and prices? A. I don't grasp your question.

Q. If an orchestra leader fails to employ the minimum number of employees which your book requires or if he fails to charge at least the minimum rates fixed in your price list, is he brought up on charges for that? A. He would be subject to charges, sure.

Q. And if he is found guilty, how is he usually treated or what are the alternatives of treatment? A. The trial board would then find him guilty and prescribe any penalties that they felt were justified from the evidence brought before them.

[p. 115] Q. And the penalties are those penalties that are set forth in either the by-laws of the Federation or the by-laws of the local? A. Our penalties are not listed in our by-laws or the Federation by-laws. As I say, there could be a fine; there could be a reprimand; there could be an expulsion; there could be a suspension; there could be various alternatives.

[p. 116] Q. Isn't it also true that if an orchestra leader persists in disobedience of the minimum rules and your price list rules that his name is published eventually in Allegro?

Mr. Ashe: Published how?

A. No.

Q. His name is never published as one who is expelled? A. If he is expelled.

Q. In other words, the publication only takes place once he is expelled? A. Yes. This is to forewarn our members that they could not perform with them.

[p. 122] Q. The question was: What procedure does your union follow in denominating someone as unfair or as a defaulter? A. Well, if we have a contract with a purchaser and he hasn't complied with that contract, he hasn't paid our leader or, in turn, of course, he hasn't paid our men, we would consider him to be unfair and then take whatever action we deem necessary. In some cases we would sue

him in court. The only time he would appear on our unfair list or the national unfair list [p. 122] would be—and it doesn't pertain to what we are discussing here, single engagements; it's a steady engagement. If a steady engagement defaulted, we would put him on the unfair list.

Q. Is there any distinction between the unfair list or the defaulter list, or is that the same thing? A. Same thing.

Q. Does it ever happen that former union members or union members are put on that list or is this only applied to third parties? A. In the main I believe they are third parties.

Q. Isn't it true that whenever a person is declared to be on the national unfair list or defaulter list members are not permitted to render any services to that person? [p. 123] A. To that establishment?

Q. Yes. A. That's true.

Q. Is it true that no member of the American Federation of Musicians or of your local or any local is permitted to play with a suspended or expelled member or non-member unless the Federation itself gives consent? A. That's true.

Q. Does the Federation, according to your experience, regularly give that consent? A. I am not aware of that, no.

Q. And isn't it true that no orchestra leader and no orchestra comprising members of your local, for example, is permitted to render services with non-members without the permission of the executive board of your local? A. That's true.

[p. 123] Q. Does your local executive board regularly give such consent? A. The only time we may consent to our sidemen performing with a non-member is if some outstanding conductor from Europe, who is here on a visa and who is going to do a couple of concerts. We would not make him a member of our local or the Federation. We allow our members to perform with him as a guest conductor.

[p. 124] Q. Isn't it true that no person is ordinarily permitted by your union to use any kind of a musical instru-

ment or device in an orchestra or for an orchestra leader unless he holds a membership card with your union or one of the affiliated unions? A. What device?

Q. I am talking about musicial instruments. A. Musicial instruments, yes, he would not be able to.

Q. Isn't it true, too, that the Federation does not permit a traveling band or orchestra leader for a travelling band to engage a non-member? A. That's true.

Q. And it is true, too, isn't it, that an orchestra leader or a band which plays miscellaneous out-of-town engagements is not permitted to employ any person except [p. 125] a person in good standing with the Federation? A. That's true.

Q. And it is true, is it not, that all contracts of any character or nature for the rendition of musicial services which come within the jurisdiction of the International or the local are subject to all existing and future provisions of your constitution and by-laws? A. Yes.

Q. Your local regards it as a violation of your local rules and as detrimental to the welfare of your union for a member, whether he is an orchestra leader or a sideman, to perform with a band or an orchestra which is advertised under the name of a non-member; isn't that right? A. That's right.

[p. 126] Q. Your union also regards it as a union offense and detrimental to the union for a member to assist in engaging or advise or permit anyone to engage a person who is not a member of one of the unions affiliated with the International; isn't that correct? A. This could be a violation, yes.

[p. 127] Q. Is it true that your union practice and your union regulations makes the orchestra leader responsible for the good standing of every member in his orchestra? A. Yes, sir.

Q. What does that exactly mean? A. Well, he must ascertain whether or not each member that he employs is in good standing with his union.

Q. In other words, all he has to do is check the card to see if the man is a member of the union? A. Right.

Q. Yes. Maybe I ought to frame it this way: Is it true that no engagement of an orchestra leader is regarded as effective unless it is first approved by your board? A. According to our by-laws, yes, that's true.

[p. 128] Q. How does that work, Mr. Manuti? Does that mean that every time an orchestra leader is engaged in the single engagement field your executive board passes on it? A. No, sir.

Q. How does it work, then? A. Well, if he reports the job to the union or he files a contract with the union, we pretty well know who our leaders are. He is supposed to have his card number on the contract when he files it or on his report. We know who the people are, and for us to go through this—I mean you can understand how much work it would take for an executive board to approve each and every contract.

Q. That's why I asked the question. A. Our department checks that through.

Q. If in a particular case you find that the man is not recognized by you as an orchestra leader, what happens? A. Well, in that case I am sure that the department would check it out or check him further and find out whether or not he is a member.

Q. And if he were not a member, what procedure, if any, would your union follow? A. We wouldn't accept his contract.

Q. Suppose he attempted to play the engagement [p. 129] anyway? A. Well, you would have to play without musicians and sidemen, because our sidemen wouldn't be able to perform with them. Our business agent would be on the job.

Q. In other words, your business agent would advise the sidemen in some way? A. That's right, that he is not in good standing and they cannot perform with him and subject themselves to charges.

Q. That advice given by your business agent to the sidemen, is that given by mail or is that given orally? A.

Usually orally, because I said we have a supervisor for each borough, and each supervisor has delegates working under him. Now, he would receive instructions from his supervisor to go on this job, where we received this contract, and ascertain that he is not a leader—rather, he is not a member of the union and when our delegate shows up on the job, because we have no way of knowing who this person engaged as sidemen, the only way we would know this is on the job itself. The delegate would tell these men that they could not perform with this leader.

Q. So that normally the time when that advice would be given would be at the time when the engagement is to be played? A. Yes, sir.

[p. 132] Q. If a man enters into—if an orchestra leader enters into a contract to supply an orchestra at a given rate, that is to say, the rates that prevail at a particular time but the engagement is to be played at a future date when new and advanced rates apply, which rates [p. 133] applies to that engagement? The old rate or the new rate? A. When we increase the rates, it is usually at a price list meeting prior to that meeting taking place. There are usually lots of resolutions presented, some of them dealing with increase in rates. At that period, prior to that meeting, you will find that the leaders will come in droves to submit their contracts, because they have a signed agreement for engagements that are going to take place at a later date, beyond the price list meeting. In order to get under the wire and get the advantage of the old rates, they submit all these contracts. We approve those contracts. Now, under our by-laws, a new wage rate doesn't become law until 14 days after it is printed in our official journal, or sometimes we set a date when these new scales will go into effect.

If we approve these contracts prior to this date, then we recognize that contract and we allow our members to perform under that agreement because we don't believe it will be fair to the purchaser that he made a contract for

a certain rate and then go to him in the middle of his contract and say to him, "You have to raise it."

Q. That never happens? A. No, sir.

[p. 134] Q. Do you recall one at which you told these orchestra leaders that you couldn't help the orchestra leaders, the union couldn't help the orchestra leaders on their tax problem because there might be a union involvement under the Sherman Anti-Trust Act? A. I didn't say that, no. What I did say was that these leaders who are pressing at that time, some of the leaders, a few leaders, were pressing at that time to be recognized as employers and I told them we could not recognize them as employers or negotiate contracts with them because we would be in violation of anti-trust. We couldn't maintain a union composed of employers and employees fixing prices.

[p. 135] So I said, "We don't recognize the leaders as employers. You are a member of this union." The employers, as far as we are concerned in the single engagement field is the person who actually pays the bill. That is our position.

Q. And it is your position that the orchestra leaders were personnel managers? Isn't that the word you used in your price list? A. That is what the price list says. That "personnel manager" has been used even prior to my becoming president. That was changed from contractor to personnel manager.

[p. 162] Q. Did the question of including employers and employees in your union come up at that meeting? A. It could have very well come up, yes.

Q. Do you recall that it did or is your memory— A. I have stated this several times.

Q. Stated what several times? A. This business of having employers and employees belonging to the same union and being in violation of the anti-trust laws if we did that. I said this individually to members, I have said this at—this was an unofficial meeting and there were 400 people. I must have just stated, but I have been stating right along what I believe the law is.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

60 Civil 2939
60 Civil 4926

JOSEPH CARROLL, ET AL., *Plaintiffs,*

– AGAINST –

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Defendants.*

Pre-Trial Order

On June 17 and July 1, 1964, the parties to this action or their attorneys appeared before the Court at a pre-trial conference pursuant to Local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken:

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph 9 of this pre-trial order.

2. The parties agreed that the trial of this action shall be based upon this order and upon the pleadings as amended, except that defendants expressly abandon the "Seventh Complete Defense" set forth in their answers relating to the failure of the individual plaintiffs to exhaust reasonable intra-union remedies.

3. (a) The parties stipulated that the following facts are not in dispute in this action, each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

(1) Plaintiffs Joseph Carroll, Charles Peterson, Ben Cutler, Marty Levitt and Dan Terry, at all times relevant herein, were and are orchestra leaders and at the commencement of these actions were members of defendants

American Federation of Musicians of the United States and Canada ("Federation") and Associated Musicians of Greater New York, Local 802 ("Local 802"). Neither Carroll, Peterson *nor Terry is presently a member of defendant unions.*

(2) *Local 802 has over 30,000 members.* They perform musical services as conductors, instrumentalists, arrangers and copyists. Local 802 represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, *and has collective bargaining agreements with various employers.*

(3) Defendants Al Manuti, Max L. Arons and Hi Jaffe as President, Secretary and Treasurer, respectively, of defndant Local 802.

(4) Membership in a local affiliated with Federation implies membership in the Federation.

(5) Defendant Federation is a labor union affiliated with the AFL-CIO and it is comprised of 683 local unions (including defndant Local 802) located throughout the United States and Canada.

(6) Defendant Federation has over 260,000 members, who perform musical services as conductors, instrumentalists, arrangers and copyists. The Federation represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreements with various employers.

(7) Defendants Herman D. Kenin, Stanley Ballard and George V. Clancy are President, Secretary and Treasurer, respectively, of the defendant Federation.

(8) A single engagement is defined in the Bylaws of defendant Local 802 and is a musical performance generally for one night, but always for less than one week, including, but not limited to, such types of functions as weddings,

commencements, debutante parties, fashion shows, sports events, college or high school dances or other social events. All other engagements are steady engagements.

(9) All members of Local 802 are entitled to have their names included in the directory of membership of Local 802 under whatever category they choose. Each of the individual plaintiffs, while a member of the union, was included in the directory as an instrumentalist. For example, Cutler is listed under the heading "saxophone", and Carroll is listed under the heading "drums".

(10) The vast majority of members of defendant unions who act as orchestra leaders do not devote their full time to the profession of orchestra leader. They also serve as sidemen; they maintain no office: they do not employ steady or part-time employees; they do not advertise; they do not use the same sidemen from one engagement to another; they do not use subleaders; they do not call for rehearsals or train their orchestras; and they do not furnish music, bandstands or uniforms. They are musicians who may lead today and may follow tomorrow.

(11) Conducting is a musical service and orchestra leaders, when conducting, perform the same type of work, whether they are "employers" (for any purpose) or "employees".

(12) Orchestra leaders have traditionally (for at least sixty-five years) been members of defendant unions and their predecessors.

(13) Almost without exception, all members of defendant unions who are now orchestra leaders (including the individual plaintiffs herein) were sidesmen at the time of joining defendant unions and remained sidemen for a number of years thereafter.

(14) Local 802's "Price List" Booklet requires each sideman to be paid minimum wages for single or steady engage-

ments. Their wages are based upon a number of factors, including the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument; whether playing is continuous or non-continuous; whether the musician has to transport certain bulky instruments; whether the musician is required to furnish an organ or music folios; whether the musician is required to rehearse; whether there is a show lasting more than twenty minutes; and whether uniforms (other than tuxedos) must be furnished by the musicians.

(15) On May 17, 1960, Local 802 adopted a resolution which increased the minimum wages payable to musicians for club dates. The recitals contained in the resolution were as follows:

> "WHEREAS, There has been no general increase in Club Date Scale since 1955, and
>
> "WHEREAS, High living costs impose an ever-increasing hardship on musicians who depend exclusively on Club Dates for a living, and
>
> WHEREAS, Workers in other branches of the Catering business have recently received wage increases, and
>
> "WHEREAS, Purchasers of music can afford an increase since music remains a relatively small part of the total party budget, and is indispensable for a successful affair, and
>
> "WHEREAS, Leaders guarantee of additional fees, as provided by union rule, as well as the prerogative of booking in volume and/or over-scale, affords ample earning potential on Club Dates, therefore * * *"

(16) On October 27, 1960, the Executive Board of Local Local 802 adopted a resolution increasing the rates of "Special Class Club Dates."

(17) Local 802's "Price List" Booklet requires each leader to receive certain minimum compensation for the

services rendered by him. *Thus,* Rule 1 of the Price List Booklet provides as follow

> "RULE 1. 'Regulations for Establishing Leaders' Fees in Single Engagements Unless Otherwise Provided For.' "
>
> "A. An engagement played by one member shall charge in addition to the Union Scale of the engagement 25 percent additional as Leader (Personnel Manager) fee.
>
> "B. An engagement played by two members shall charge in addition to the Union Scale of the engagement 50 per cent additional as (Personnel Manager) fee.
>
> "C. An engagement played by three members shall charge in addition to the Union Scale for the engagement 75 per cent additional as (Personnel Manager) fee.
>
> "D. Where four or more men are employed the Leader shall charge and receive double the regular scale, i.e., 100 uper cent additional as Leader (Personnel Manager) fee."

(18) Similarly, Local 802's "Price List" provides as to steady engagements:

> "RULE 10. On all steady engagements the Leader (Personnel Manager) shall charge 25 per cent additional when only one (1) man is employed, 50 per cent additional when two (2) men are employed, 75 per cent additional when three (3) men are employed, and for all engagements of four (4) men or more he shall charge double the price per man, except where otherwise provided."

(19) The almost undeviating practice for at least 65 years, both for single and steady engagements has been

for orchestra leaders to receive as minimum compensation for their services double the wages of sideman. This practice also applies to the rendition of services by leaders in such diverse areas as television, radio, phonograph recordings, motion pictures, symphony orchestras, night clubs, hotels, opera companies and theatres.

(20) In practically every area of musical entertainment, the leader receives as minimum compensation double the sidemen's minimum wages.

(21) Leaders also receive as part of their minimum compensation for single engagements a sum equal to 8% of the scale wages to be paid to the leader and sidemen on each engagement. The provision for such payment is contained in the "Price List" Booklet which provides as follows:

> "On every single engagement, in all classifications, the Leaders shall receive, in addition to his Leader money, a sum equal to seven (7) per cent of the total contract price, *if it is at scale.*
>
> *"In the event that the contract price is at least seven (7) percent above scale, the contract will be approved."* (Emphasis supplied)

The resolution which increased the 7% charge to 8% contains an identical provision.

(22) The reasons why orchestra leaders are required to receive the aforementioned additional sum of 7%, now 8%, of scale, are those set forth in the pamphlet issued by local 802 in December 1949, entitled "Your Federal Tax Liability". The pamphlet states as follows:

> "In order to protect the leader against any reduction in our price list because of the imposition of these [social security] taxes by the government, the Executive Board had amended the Price List on Single engagements to provide that on all single engagements, in all classifications, the leader shall receive, in addi-

tion to his leader money, a sum equal to 7 per cent of the total contract price. The 7 per cent was computed by approximating the maximum tax liability at 5 per cent. The additional 2 per cent was added, first, to cover the leader's bookkeeping expenses, and secondly, to take account of the fact that he is liable for taxes on the total sum, which includes the additional 7 per cent Price List increase."

(23) In 1957 plaintiff Peterson submitted a "Proposed Price List Amendment", the effect of which would have required that all members of Local 802 acting as leaders secure a federal "Employers Number", and that failure by any such member to do so "shall be punishable by a fine not to exceed $500.00 for the first offense." The first two recitals of that resolution stated:

"WHEREAS, Sub-Division number 2 of the rules governing single engagements provide that the leader must charge and receive, in addition to the union scale, a sum equal to cover (7) per cent of the total contract price and

"WHEREAS, the purpose of this regulation is to compensate the leader for the cost incurred in complying with Federal and State regulations calling for the payment of withholding taxes, social security, state disability, etc. * * *"

(24) Local 802's "Price List" Booklet provides that the subleader shall receive the following as his minimum wage for single engagements:

"Rule 2. In the absence of the Leader (Personnel Manager), the member representing him for any part or all of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided.

"A. On all outside (Single) engagements, on which the orchestra is called upon to rehearse and/or play

a show and for which there is an extra charge. The Musician who actually conducts the rehearsal and/or show shall receive double the extra charge regardless as to who contracts the engagement, number of musicians employed or who stands in front of the orchestra."

(25) Similarly, in connection with steady engagements the "Price List" Booklet provides:

"Rule 11. In the absence of the Leader (Personnel Manager) the member representing him for all or part of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided."

(26) Thus, the subleader must receive as his minimum wages for conducting a four-piece band on a single engagement, one and one-half times the sideman's scale, or double the sideman's scale if rehearsal or show is involved.

(27) Local 802 not only establishes minimum compensation for sidemen and orchestra leaders on single and steady engagements, but also requires orchestra leaders to charge purchasers prices which are not less than the aggregate of the minimum compensation payable to sidemen and leaders.

(28) Provisions relating to the Travelling Surcharge have been part of Federation's By-Laws for upwards of thirty-five years.

(29) Section 8 of Recommendation No. 11, which was adopted by that Convention, provided that:

"8. Present provisions establishing minimum wages for traveling engagements at 10% in excess of applicable Local sales shall be reaffirmed."

(30) Defendant unions require their members to use a form of contract known as the "Form B Contract". Any

member failing to use the Form B contract is subject to penalty by defendant unions.

(31) The individual plaintiffs have heretofore used the Form B contract prescribed by defendant unions.

(32) Each of the individual plaintiffs claims to be a member of the National Association of Orchestra Leaders.

3. (b) It is plaintiffs' contention that defendants

(a) Fix the minimum *prices* of musical engagements, forbidding competition at prices below such minimum prices by establishing a minimum compensation or profit to be derived from musical engagements by orchestra-leader-employers; by establishing an 8% "surcharge" computed on the total price of the contract *at scale* (at least 50% of the musical engagements being priced at scale); by requiring in many instances a 10% price addendum in the form of the 10% "traveling surcharge"; by requiring the use of frequently increasing "minimums" (i.e., minimum quotas of sidemen) under arrangements whereby the orchestra-leader-employers' profits increased the more those minimums are increased in view of the required application of the 8% surcharge rule.

(b) Imposed unreasonable restraints on trade and restrictions on competition in the field of musical engagements by price-fixing as aforesaid; by including or compelling orchestra-leader-employers to refrain from competing with orchestra-leader-employers and with AFM licensed bookers for musical engagements at prices below defendants' minimum prices; by inducing or compelling bookers, agents, social secretaries, banquet managers, representatives and manager of union members, orchestras or bands, and owners or operators of hotels, night clubs and restaurants to avoid or to boycott orchestra-leader-employers who are not members of defendants; by inducting or compelling members of defendant unon to refrain from assisting orchestra-leader-employers who are not members of defendant unions; by

inducing or compelling the owners or operators of facilities where music is played, as well as clients of orchestra-leader-employers (purchasers of music) to refrain from engagements or contracts for engagements with orchestra-leader-employers who are not AFM members or who have fallen into disfavor with defendants; by inducing or compelling orchestra-leader-employers to adopt defendants' standards for determining the needs of the public and the methods of meeting the needs of the public in the field of musical engagements; and by discriminatory pricing, fixed or arranged by AFM, based on the differences in Local jurisdictions.

(c) Impose unreasonable burdens on interstate commerce by enforcement of Article 15 of the AFM By-Laws with respect to "traveling surcharges"; by restrictive rules on traveling engagements played at hotels, cafes, clubs, dance halls, etc., as contained in Article 17 of the AFM By-Laws; by restrictive rules regarding military concerts and brass bands as contained in Article 26 of the AFM By-Laws; by restrictive rules for traveling theatrical engagements as contained in Articles 18 and 20 of the AFM By-Laws; by restrictive rules pertaining to records and transcriptions as contained in Article 24 of the AFM By-Laws; by restrictive rules pertaining to radio and television as contained in Article 23 of the AFM By-Laws; by restrictive transportation rules as contained in Article 19 of the AFM By-Laws; by restrictive rules pertaining to traveling concert orchestras as contained in Article 21 of the AFM By-Laws; and by restrictive rules pertaining to fairs, circuses, rodeos and carnivals as contained in Article 27 of the AFM By-Laws.

(d) Engage in monopolistic practices by inducing or coercing orchestra-leader-employers to become members of defendant unions in order to control them or with the effect of enabling defendants to exercise control over them; by inducing or compelling orchestra-leaders, sidemen and

owners or operators of facilities where music is played, to boycott orchestra-leader-employers who are not members of defendant union; by inducing or compelling booking agents, bookers, social secretaries, banquet managers, representatives and managers of union members, orchestras or bands to refrain from contracting with orchestra-leader-employers who are not members of defendant union; by preventing competition for musical engagements at prices below the minimum prices unilaterally fixed by defendants; by requiring approval of all contracts for musical engagements by the local having jurisdiction and in some cases by the AFM itself in circumstances where such approval is withheld unless the contract embodies the features, among others, denounced in the complaint as violations of the antitrust laws; by requiring all leaders and sidemen who are AFM members to insist on the inclusion, in their contracts, of the features required by Article 9 and 34 of the AFM By-Laws; by maintaining a system of licensing agents and representatives under Article 25 of the AFM By-Laws and by adjudicating or "arbitrating" claims under Article 9 of the said By-Laws; by barring free access into the business or profession of orchestra leaders where defendants' restrictive policies and practices are threatened or are not complied with by the involved orchestra-leaders; by insisting on the use of the false and fictional "Form B" contract; and by the coercions implicit in the use of defendants' Unfair, Defaulter and Forbidden Territory Lists under Article 10 of the AFM By-Laws; by assigning musical engagements to AFM leaders who are favorites of AFM officials; by apportioning musical engagements according to AFM rules; by regimentation of employers through AFM rules requiring reports, interrogations, trials, penalties and similar interferences.

The predatory practices of which plaintiffs complain are (1) interferences with their business and their clients; (2) impositions of wage scales unilaterally and without collective bargaining or discussion of any sort; (3) dis-

criminatory treatment of orchestra-leader-employers; (4) retaliations and reprisals by use of AFM power and facilities; (5) attempts at blocking access to Courts; (6) interference with free speech and free assembly of members; (7) unlawful exactions; (8) failure of defendant unions to fulfill statutory definition of "labor organization"; (9) unilateral establishment of "minimums"; (10) regimentation of booking agents; (11) use of Form B contracts and other contractual provisions.

3. (c) It is the defendants' contention that:

(1) orchestra leaders are not employers; and (2) assuming, however, that orchestra leaders, such as the individual plaintiffs, are employers:

A. Orchestra leaders are in job and wage competition and have other economic interrelationships with other members of defendant unions who are employees. Accordingly, defendant unions have the right to represent orchestra leaders, whether or not employers, and to regulate the wages, hours, and other coditions of employment of all members of defendant unions, including orchestra leaders.

B. The acts complained of by plaintiffs in the complaints relate to a controversy concerning terms and conditions of employment, and concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment. Such a controversy is a "labor dispute" within the meaning of the Norris-LaGuardia and Clayton Acts, and hence no injunction can be issued by this Court.

C. The acts complained of by plaintiffs do not constitute a contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states.

D. The acts complained of by plaintiffs do not constitute monopolization of or an attempt to monopolize, or a com-

bination or conspiracy to monopolize any part af the trade or commerce of the United States.

E. The acts complained of by plaintiffs only involve the labor of members of defendant unions in the performance of musical services, which is not a commodity or article of commerce.

F. The acts complained of by plaintiffs in the complaints are immunized from the prohibitions of the antitrust laws.

G. The issues raised by the complaints are within the exclusive primary jurisdiction of the National Labor Relations Board, and hence, pursuant to the provisions of the National Labor Relations Act, as amended, this Court lacks jurisdiction over the instant controversy.

H. The performance of music in the single engagement field is purely a local affiair and does not constitute trade or commerce within the meaning of the Sherman and Clayton Acts.

I. Plaintiffs have not suffered any injuries sufficient to entitle them to equitable relief in this action.

J. Plaintiffs are in *pari delicto* with defendants as to any alleged violation of the antitrust laws and are thereby precluded from the equitable relief sought herein.

K. Plaintiff Orchestra Leaders of Greater New York ("OLGNY") is not an association; is not presently in existence; has not been injured or aggrieved by any of defendants' activities, and has no standing to bring the instant actions.

L. There is no class; plaintiffs do not insure the adequate representation of a class; and the class, if any exists, is not so numerous as to make it impractical to bring them all before the Court.

M. Plaintiffs Carroll, Peterson and Terry, who are no longer members of the defendant unions, are not injured

by any of the defendants' activities challenged by the complaints; are not threatened with injury by reason of any of the matters set forth in the complaints; and have no standing to sue.

N. Plaintiffs have been guilty of unclean hands in that they have misrepresented orders issued by this Court, and based upon such misrepresentation, have threatened defendants and their members with contempt proceedings and criminal prosecutions.

4. (a) The exhibits which plaintiff now expects to offer at the trial are the following:

1. The documents pertaining to the expulsion of Charles Peterson.

2. The documents pertaining to the expulsion of Joseph Carroll.

3. The reports filed by the AFM and by Local 802 with the Secretary of Labor under the Landrum-Griffin Act

4. The permits and other documents pertaining to the regulation by AFM of booking agents.

5. The Metropolitan Opera contract negotiated by Local 802.

6. The City Center Contract (New York City Ballet).

7. The League of New York Theatres Contract.

8. The AFM contract respecting TV and radio.

9. The AFM contract respecting TV and Video tapes.

10. The AFM contract respecting phonograph records.

11. The AFM contract respecting TV films.

12. The basic AFM agreement respecting motion pictures.

13. The basic AFM agreement respecting documentary films.

14. Notices in Allegro pertaining to recordings.

15. The Local 802 leaflet entitled: "Your Tax Liability".

16. Local 802 publications pertaining to its interstate involvement.

17. Allegro notice re "Special Class Club Dates".

18. Local 802 notices in Allegro respecting recordings.

19. Local 802's Executive Board's Statement of March 1965 respecting Price Lists.

20. Such additional documentation as may be necessary on rebuttal or cross-examination.

21. The documents pertaining to the attempted expulsion of Ben Cutler.

22. The basic AFM contract respecting Jingles.

23. The various documents listed in plaintiffs' Notice to Produce herewith submitted.

4. (b) Based upon the assumption that the issues herein are limited to the allegation of the complaints, the exhibits which defendants now expect to offer at the trial are:

(1) The transcript of testimony and the exhibits introduced at the trial of 60 Civil 1169 and 4025, which took place on March 5, 1962.

(2) The transcript of testimony of the plaintiffs herein, taken at the hearing on the motion for a preliminary injunction, dated July 20, 1962, in the Cutler action (62 Civ. 2252). In addition, defendants intend to introduce Exhibit 15 annexed to the affidavit in opposition to plaintiffs' motion for a preliminary injunction to the Cutler action.

(3) The following exhibits submitted by defendants in support of their motion for summary judgment herein, dated January 20, 1964:

A. Exhibit AT-A—November 1960 Issue of Allegro, page 7.

B. Exhibit AT-B—June 1960 Issue of Allegro, pages 15-16

C. Exhibit AT-C—Booklet Issued in 1895 by Musicians Mutual Protective Union

D. Exhibit AT-D—Schedule of Basic Hourly Rates in Various Fields of Musical Entertainment

E. Exhibits AT-F through AT-O, which consist of the following collective bargaining agreements between the Federation and Local 802 on the one hand, and various users of music on the other:

(1) AT-F—Agreement between the New York City Ballet and Local 802, dated March 1, 1962

(2) AT-G—Agreement between Metropolitan Opera Association, Inc. and Local 802, dated July 1, 1961

(3) AT-H—Form of Agreement between various restaurants and hotels and Local 802

(4) AT-I—Agreement between League of New York Theatres, Inc. and Local 802, dated September 6, 1960

(5) AT-J—Form of Agreement of the Federation relating to television video tape

(6) AT-K—Form of Agreement of Federation relating to television and radio commercial announcements

(7) AT-L—Form of Agreement of Federation relating to phonograph records

(8) AT-M—Form of Agreement of Federation relating to television film

(9) AT-N—Form of Agreement of Federation relating to independent motion pictures

(10) AT-O—Form of Agreement of Federation relating to non-theatrical documentary and industrial films.

F. Exhibit AT-P—Charges filed by plaintiffs with the National Labor Relations Board, and the disposition of those charges

G. Exhibit AT-Q—Charge filed with the National Labor Relations Board on or about January 9, 1964, by National Association of Orchestra Leaders

H. Exhibit AT-R—January 1960 Issue of Allegro, pages 10-11

I. Exhibit AT-S—Certification by the National Labor Relations Board of Federation as collective bargaining agent for musicians employed by Spartan Productions.

(4) The following exhibits which have not previously been referred to by defendants:

A. Allegro, January 1960, pages 10, 11 and 20

B. Allegro, March 1960, pages 3-5

C. Allegro, May 1960, page 2

D. Resolution 3 on page 4 of Defendants' Exhibit N

E. Price List Resolution, dated March 25, 1960, submitted by Ben Cutler to Local 802

F. Price List Resolution in 1957, submitted by Charles Peterson to Local 802

G. Price List Resolution, dated January 25, 1960, submitted by Charles Peterson to Local 802

H. Membership applications of Cutler, Carroll, Peterson, Levitt and Terry

I. The Constitution and By-Laws of (i) the Federation dated 1962, which contains the 1963 Amend-

ments, and (ii) Local 802, revised as of September 9, 1963

J. Letter from NAOL to Local 129, dated March 25, 1964

K. Letter from Ben Cutler to Local 444 of the Federation, dated February 4, 1964

L. Various letters from OLGNY, dated July 26 and 30, 1962, and August 9, and 16, 1962

M. The following letters from NAOL or OLGNY:

(1) Letter dated November 6, 1963, to Local 9

(2) Letter dated November 7, 1963, to Local 13

(3) Letter dated April 23, 1964, to Local 809

(4) Letter dated May 7, 1964, to George V. Clancy, Treasurer of the Federation

(5) Letters dated July 19, 1963, to Locals 9 and 402

(6) Letter dated March 12, 1964, to Local 836

N. The following letters from Godfrey P. Schmidt, Esq., attorney for plaintiffs:

(1) Letter dated February 13, 1963, to Local 563

(2) Letter dated August 16, 1963, to Local 334

4. (c) Should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each other party and to the Court by serving and filing a supplemental pretrial memorandum. The supplemental pretrial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the exhibits were not theretofore identified in a pretrial memorandum.

4. (d) On or before September 30, 1964, the attorneys for all parties shall meet together at a convenient time and place, for the purpose of exchanging and examining all ex-

hibits, and shall furnish the other parties with a complete list of all exhibits to be introduced. Within ten days after such meeting, each of the parties shall file a supplemental pre-trial memorandum, wherein they shall state which exhibits of the other party are stipulated as being authentic. In such supplemental pre-trial memorandum, each party may reserve the right to object to the materiality or relevancy of each document preceded by the letter "A", and each party may reserve the right to object to all or a portion of each document preceded by the letter "B" on the ground that it is inadmissible under the hearsay rule.

5. (a) The witnesses whom plaintiffs now intend to call are the following:

Ben Cutler	Orchestra Leader
Joseph Carroll	" "
Charles Peterson	" "
Marvin Kurz	" "
Harry Lefcourt	" "
Marty Ames	" "
Stan Kenton	" "
Ralph Marterie	" "
Ruby Newman	" "
Meyer Davis	" "
Louis Ricardo	AFM Booking Agent
Neil Kirk	" " "
Tom O'Connell	" " "
Catherine Palmer	" " "
Willard Alexander	" " "
George Hamid	" " "
Charles Dixon	" " "
Joe Glazer	" " "
Daniel Hickey	Hotelman
Clyde Harris	"
Jack Egan	"
Joseph Binnse	"
John Perry	"
John McDonnell	"

Al Manuti	Union Official
Herman Kenin	" "
Matt Gillespie	" "
Emil Powell	" "
Jack Staulcup	" "
John Cipriano	" "
Max Arons	" "
Stanley Ballard	" "
Al Brown	" "
Sam Jack Kaufman	" "
James Marley	" "
Ted Diamond	Sideman
Al Gurten	"
Charles McCarthy	"
Murray Rothstein	"
Lester Soloman	"
Julius Schwartz	"
Sam Bass	"
Seymour Segal	N.Y.C. Official
Alfred Green	N.Y.S. Official
Marty Waters	Client (Purchaser of Music)
H. R. Jenkins	Recordings

5. (b) Based upon the assumption that the issues herein are limited to the allegation of the complaints and that no evidence will be permitted by this Court relating to such latters as booking agents; the alleged exercise by defendant unions of control over former members; procedures of defendant unions relating to arbitration; and the alleged misrepresentations by defendant unions of the legality of the Traveling Surcharge work tax and the Local 802 work tax, the witnesses which defendants now expect to call at the trial are:

Max L. Arons	261 West 52 Street, New York, N. Y.
William McCaffrey	261 West 52 Street, New York, N. Y.
Earl Shendell	261 West 52 Street, New York, N. Y.
Max Sontag	261 West 52 Street, New York, N. Y.

Stanley Ballard	220 Mt. Pleasant Avenue, Newark, N. J.
Guy Scola	220 Mt. Pleasant Avenue, Newark, N. J.
Robert Crothers	220 Mt. Pleasant Avenue, Newark, N. J.
Gilbert Rogers	425 Park Avenue, New York, N. Y.

5. (c) Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. With regard to any aditional witnesses to be called, after September 15, 1964, said supplemental pre-trial memorandum shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum.

6. There shall be no limit to the number of expert witnesses called by the parties.

7. Plaintiffs at this time expect to require twelve trial days; defendants at this time expect to require five trial days.

8. The issues to be tried as formulated by the Court are as follows:

(a) Are plaintiffs, and orchestra leaders who function as they do, employers and a non-labor group for the purpose of the antitrust laws?

(b) Is there a job and wage competition or other economic interrelationship between plaintiff-employer-orches-

tra-leaders on the one hand and on the other hand leaders and subleaders who are solely employees?

(c) Is there a job and wage competition on the one hand between leaders who play instruments ond on the other hand sidemen who are employees and likewise play instruments?

(d) Did and do defendants fix the minimum prices of musical engagements in the single or steady engagement field in collaboration with employers as a non-labor group?

(e) Did and do defendants combine, arrange or conspire with employers as a non-labor group to fix minimum prices, to restrain trade or commerce, to unreasonably burden interstate commerce and to effectuate a monopoly in the area of musical services in the United States?

(f) Is the regulation by defendant unions of minimum compensation and working conditions of orchestra leaders substantially related to the preservation of wages and working conditions of other members of defendant unions who are employees?

(g) Do defendants induce or compel orchestra-leader-employers—

(1) To become and to remain members in good standing of the American Federation of Musicians?

(2) To refrain from competing for musical engagements with other orchestra-leader-employers at prices below the minimum prices fixed by defendants?

(h) Do defendants induce or compel orchestra-leader-employers, sidemen and the owners or operators of facilities where musical engagements are played to boycott or refuse to deal with orchestra-leader-employers who are not American Federation of Musicians members or who refuse to comply with American Federation of Musician rules, regulations and practices alleged in the complaints?

(i) Do defendants enforce minimum prices, restraint of trade, monopoly and burdens on interstate commerce by:

(1) Requiring approval of all contracts for musical engagements?

(2) Requiring use of the "Form B" contract; and

(3) Requiring use of the contract provisions mandated by Article 34 of the American Federation of Musicians Constitution and Bylaws?

(j) Do defendants pursue with union penalties such as fines and expulsion and with union reprisals such as boycotting and black-listing members or expelled members who violate the aforesaid American Federation of Musicians regulations alleged in the complaints?

(k) Do defendants engage in practices as alleged in the complaints which prejudice purchasers of music and which tend to raise prices or otherwise control the market to the detriment of purchasers of music and defraud such purchasers of the advantages of free competition?

(l) Do the specific acts complained of by plaintiffs in the complaints relate to a controversy concerning terms and conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms and conditions of employment?

(m) Whether the issues raised by the complaints are within the exclusive primary jurisdiction of the National Labor Relations Board?

(n) Whether plaintiffs are in *pari delicto* with defendants as to any alleged violation of the antitrust laws and thereby precluded from the equitable relief sought herein?

(o) Whether the specific acts complained of by plaintiffs in the complaints constitute monopolization of or an attempt to monopolize or a combination or conspiracy to monopolize any part of the trade or commerce of the United States?

(p) Whether the performance of music in the single engagement field is purely a local affair and does not constitute trade or commerce within the meaning of the Sherman and Clayton Acts?

(q) Whether plaintiff Orchestra Leaders of Greater New York has any standing to sue as a plaintiff in this action or is a proper party plaintiff?

(r) Whether plaintiffs may bring the instant action as a class action?

(s) Whether the plaintiffs have been guilty of unclean hands so as to preclude the granting of any relief?

9. The case will be tried first solely on the issues of liability.

Dated: New York, New York
August 12, 1964

So Ordered:

.....
U.S.D.J.

Consented To:

.....
Attorney for Plaintiffs

McGoldrick, Dannett, Horowitz & Golub

By .....
Attorneys for Defendants American Federation of Musicians of the United States and Canada, Herman D. Kenin, Stanley Ballard and George V. Clancy

Ashe & Rifkin

By .....
Attorneys for Defendants Associated Musicians of Greater New York, Local 802, Al Manuti, Max L. Arons and Hi Jaffe

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARROLL et al. v. AMERICAN FEDERATION OF MUSICIANS OF UNITED STATES AND CANADA et al., Nos. 60-2939 and 60-4926, May 17, 1965

LEVET, District Judge:—The plaintiff-orchestra leaders claim that the defendants American Federation of Musicians of the United States and Canada ("Federation of "AFM") and Associated Musicians of Greater New York Local 802 ("Local 802") have violated the antitrust laws. I have endeavored to categorize the multitude of alleged violations, making a sufficient number of Findings of Fact in each category to adequately define them. I have not found it either necessary or desirable to include every union regulation which might possibly be included in each category. The dispute in this case centers primarily on the applicable law and the interpretation to be given to the facts, rather than the facts themselves.

The court directed a consolidated trial in 60 Civil 2939 and 60 Civil 4926. The single set of Findings of Fact and Conclusions of Law relates to both actions.

Since the class suit was not sustained, this opinion relates exclusively to the plaintiffs in the action. Nevertheless, the court has found evidence presented as to other orchestra leaders who in certain respects are similarly situated to the plaintiffs relevant in making findings relatint go some of plaintiffs' practices.

The parties stipulated that the testimony in 60 Civil 1169 and 60 Civil 4025 is part of the record in this case (1019-20). Consideration of damages was reserved for a time subsequent to the decision on liability.

This case having been tried, the court, after considering the pleadings, evidence, exhibits, briefs and stipulations of the parties and the proposed findings of fact and conclu-

sions of law, makes the Findings of Fact and Conclusions of Law listed below.[1]

Findings of Fact

I. THE PARTIES

A. Plaintiffs

1. Plaintiffs Joseph Carroll, Charles Peterson, Ben Cutler and Marty Levitt, at all times relevant herein, were and are orchestra leaders, and at the commencement of these actions were members of defendants AFM and Local 802. Neither Carroll nor Peterson is presently a member of defendant unions (Stipulated Fact 1).

2. Plaintiffs Charles Turecamo and Dan Terry have withdrawn from the action.

3. At all times relevant herein, plaintiff Peterson was an employee of corporations known as Charles Peterson Theatrical Productions, Inc. ("Peterson, Inc.") and Carlton M. Hub, Inc. ("Hub, Inc."). Peterson was the sole stockholder of Peterson, Inc. and now controls Hub, Inc. (1755, 1983-84). Peterson always handled his musical engagements through Peterson, Inc. until recently when he began to use Hub, Inc. to (1756, 1983, 1986, Exs. GB, GG, GD).

4. Plaintiff Peterson was expelled from the defendant unions for various reasons, including his failure to abide by the union minimum wage scale (2117-18; Exs. FR-FY).

5. Plaintiff Carroll was expelled from Federation for failing to furnish Local 38 of the Federation with informa-

[1] References to "Stipulated Fact" are to those stipulated facts set forth in paragraph 3 of the pre-trial order herein. References to a number, "Ex." followed by a number, and "Ex." followed by a letter, are to the stenographer's minutes, plaintiffs' exhibits and defendants' exhibits, respectively. References to "St. Min." followed by a number are to pages in the stenographer's minutes of the trial of 60 Civil 1169 and 4025, which, pursuant to stipulation is part of the record in this action. "F.F." indicate Findings of Fact.

tion pertaining to an engagement which he performed in Westchester County. He was also expelled by Local 802 for violation of various of its By-Laws, including his failure to abide by Local 802's wage scales (Carroll v. Associated Musicians of Greater New York, Local 802, 52 LRRM 2950 [S.D.N.Y. 1963]).

6. There is no evidence that plaintiff Orchestra Leaders of Greater New York ("OLGNY") ha sin any way been damaged or aggrieved by any conduct of defendants or that it has any interest in these actions (see Stipulation of plaintiffs' counsel in letter to this court dated November 13, 1964).

7. Plaintiff Levitt performs services on club dates (577) and on steady engagements in hotels and ballrooms (564, 571).

8. Substantially all of plaintiff Cutler's services are performed in the club date field (2227). He has also made one or two recordings and appeared on one television program (2560; St. Min. 83-84; Exs. 310, DR). In the steady engagement field he has performed in hotels, restaurants and nightclubs (2227; St. Min. 70-71).

9. Plaintiff Peterson is primarily engaged in the club date single engagement field. He has also worked in concerts and in the steady engagement field in certain hotels and dance halls between 1945 and 1950 (1742-43; St. Min. 854-858).

10. Plaintiff Carroll is "almost exclusively" engaged in the club date single engagement field. He served as a leader in the steady engagement field at the Stork Club between 1945-48 (1425).

11. The plaintiffs in practicing their professions:

(a) maintain their own offices where they employ steady and/or part-time employees (567; St. Min. 71, 76-81, 258-59, 347, 360);

(b) acquire business as a result of their own contacts, reputations, and personal solicitations (567; St. Min. 78-79, 261-62, 360);

(c) engage in and pay for advertising (567; St. Min. 80-85, 87, 127-128, 261-262, 360) and prominently display their names wherever their engagements are played, thus indicating that the orchestra is, e.g., the Charles Peterson Orchestra (St. Min. 116, 260, 347).

12. Because of Carroll's and Peterson's expulsions from the union, they were thereafter precluded from actively taking part in their engagements either as conductors or instrumentalists (1777-79, 1936-37, 2039-44, 2110-12). (See F.F. XV.)

B. The Defendants

13. Defendant Local 802 is a labor union affiliated with the defendant Federation and with the AFL-CIO. The territorial jurisdiction of defendant Local 802 consists of the five boroughs of New York City and Nassau and Suffolk Counties (Ex. CJ, Section 6, p. 5; St. Min. 80-81, 453).

14. Local 802 has over 30,000 members. They perform musical services as conductors, instrumentalists, arrangers and copyists. Local 802 represents, and has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreements with various employers (Stipulated Fact 2).

15. Membership in a local affiliated with Federation implies membership in the Federation (Stipulated Fact 4).

16. Defendant Federation is a labor union affiliated with the AFL-CIO and it consists of 683 local unions (including defendant Local 802) located throughout the United States and Canada (Stipulated Fact 5).

17. Defendant Federation has over 260,000 members, who perform musical services as conductors, instrumentalists, arrangers and copists. The Federation, represents, and

has traditionally represented, among others, members who are orchestra leaders, subleaders and sidemen, and has collective bargaining agreement with various employers (Stipulated Fact 6).

18. Almost all orchestra leaders and sidemen in the United States are members of AFM or one of its locals (84, 164-65, 1105).

19. The AFM publishes and is governed by its "Constitution, By-Laws and Policy" (Exs. 300, 12, 160, 161, 162, 163, 164, 164a, 164b). Likewise, Local 802 publishes and is governed by its Constitution and By-Laws (Exs. 165-172, 141, 29) and other booklets including Price Lists and Wage Scale Booklets (Exs. 173-195, 205-209, 306).

20. Defendants Al Manuti, Max L. Arons and Hyman B. Jaffe are President, Secretary and Treasurer, respectively, of defendant Local 802 (Stipulated Fact 3).

21. Defendants Herman D. Kenin, Stanley Ballard and George V. Clancey are President, Secretary and Treasurer, respectively, of the defendant Federation (Stipulated Fact 7).

22. There is no evidence that any of the defendants who are officers of the defendant unions have committed, as individuals, any of the acts complained of by plaintiffs.

23. The defendants Al Manuti, Max L. Arons and Hyman B. Jaffe, together with other members of Local 802, are members of Local 802's Executive Board (the "Executive Board") (Ex. CJ, Section 4, p. 5).

II. Definitions

24. "Single engagements" are engagements generally for one day, but always for less than one week (Stipulated Fact 8). All other engagements are referred to as "steady engagements" (id.).

25. For convenience of reference in this opinion, certain types of engagements sharing some common characteristics

will be referred to as groups. Thus, a "club date" is a single engagement such as a wedding, commencement, bar mitzvah, debutante party, fashion show, or other social event (Stipulated Fact 8; St. Min. 69, 242-43, 438, 457-59, 806). Steady engagements at hotels, nightclubs, dance halls or restaurants will be called "hotel" steady engagements. Single engagements other than club date single engagements (3108, 3183-84, 3830-31, 3841), e.g., TV, recording and all steady engagements, will be referred to as the "non-club date" field.

III. Music Industry Generally

26. Members of defendant unions perform services as orchestra leaders, subleaders and sidemen on club dates and for hotels, restaurants, nightclubs, recording companies, broadcasting companies, theatres, steamships, and for The Radio City Music Hall, The Metropolitan Opera, The New York Philharmonic Society, and The City Center of New York (see F.F. I(A), supra, III, XIV, infra).

27. Plaintiffs and intervenors are in a market for musical services which includes states other than New York, as well as New York (1425, 2227, 2231).

28. Musical employment is highly casual, and except for employment by symphonic orchestras, a few opera societies and on staffs of network owned radio and television broadcasters, job tenure and enduring employer-employee relationships rarely exist (3673).

29. Musicians do not confine their activities to any one musical field. They seek engagements and perform services in any musical field where job opportunities exist (3291-96, 2156, 2159-65, 2417-18, 2875, 2889-90, 1159, 1160, Ex. CR). Thus, musicians who perform services as orchestra leaders, subleaders and sidemen in the club date field also perform services in non-club date fields (1160, 1314-15, 2417-18, 3074-75, 3291-96, 3661-62). Conversely, musicians who perform in the non-club date fields also work as leaders, sub-

leaders, or sidemen in the club date field when they are not otherwise engaged (564, 571, 1818, 1820, 1860, 1927-29, 2154-57, 2159-65, 2227-28, 2290-91, 2417-18, 2430, 2889-90, 3074-75, 3291-96, 3661-62).

30. The number of steady engagements is a small minority of the total number of engagements, single and steady (274-75, 350-51, 3108-09).

IV. Leaders Generally

31. Orchestra leaders, including plaintiffs, conduct at engagements at which they personally appear (839-41, 960, 1311, 1427; St. Min. 116, 393).

32. Conducting is a musical service and orchestra leaders, when conducting, fulfill the same function, whether they are "employers" (for any purpose) or "employees" (Stipulated Fact 11), and whether they are working in the single engagement or the steady engagement field (578-79, 713-16, 1054-56, 1182-83, 3535-36).

33. Only a relatively small group of musicians act as leaders all or virtually all the time. Plaintiffs are included in this group (3666-67; Ex. 58).

V. Job or Wage Competition or Other Economic Interrelationship Between Leaders and Other Union Members

A. Interrelationship between leaders and sidemen who occasionally lead

34. A considerable number of musicians act only occasionally as leaders and act as sidemen the rest of the time (Exs. K, L, M; Stipulated Fact 10).

35. Such musicians who work as sidemen in club date or non-club date fields perform as leaders in the hotel steady and club date fields. They bid for the same jobs as full-time leaders such as plaintiffs and perform the same musical service when they get a job. They also perform in the same

places as full-time leaders (2291, 2553-54, 2571, 2395-96, 2411-12, 2422-23, 2427, 2428-30, 2874-75, 2889-90, 2894, 3038-40, 3052-54, 3088-89, 3293, 3653-54, 3666-68, Exs. 58 DE, pp. 188-89, HE; F.F. 29).

B. Interrelationship between leaders and subleaders

36. Plaintiffs belong to a group of orchestra leaders operating primarily in the club date field and occasionally in the hotel steady field who regularly use subleaders for their engagements. They generally do this when they accept simultaneous engagements for more than one orchestra. Subject to instructions which are sometimes given by the leader, the subleader performs all the musical services which the leader would have performed had he been present (327, 565-66, 573, 582, 607, 616-17, 812, 826-27, 708, 838, 895, 1010-11, 1193-94, 1864-66, 1896, 2604-06, 3045; St. Min. 73, 76, 130-31, 176, 276, 307, 314, 393, 801, 873-74).

37. Subleaders are employees (conceded by plaintiffs in marking defendants proposed findings of fact).

38. Each time plaintiffs personally conduct an orchestra in the hotel steady and club date fields, they displace the services of a subleader who would otherwise have been engaged to conduct the orchestra (583-84, 565-66, 573, 582, 617, 704, 845, 812-14, 960-65, 1194, 1313, 1353, 1375-76, 1778-79, 2039-44, 2604-06; St. Min. 83-84; F.F. 36).

C. Interrelationship between leaders and sidemen

39. Instrumentalists who perform services in orchestras other than as leaders or subleaders are referred to as sidemen.

40. Sidemen are employees (conceded by plaintiffs in marking defendants' proposed findings of fact).

41. Almost without exception, all members of defendant unions who are now orchestra leaders (including the individual plaintiffs herein) worked as sidemen when they

joined defendant unions and continued to work as sidemen for a number of years thereafter (Stipulated Fact 13).

42. All members of Local 802 are entitled to have their names included in the directory of membership of Local 802 under whatever category they select. Each of the individual plaintiffs, while a member of the union, was included in the directory as an instrumentalist. For example, Cutler is listed under the heading "saxophone," and Carroll was listed under the heading "drums' (Stipulated Fact 9).

43. Plaintiffs other than Peterson (2039) belong to a group of orchestra leaders, operating primarily in the club date field and occasionally in the hotel steady field, who often, but not always, play musical instruments in addition to conducting at engagements at which they personally appear (524, 609-10, 826, 839-40, 957-58, 961-62, 1194, 1311-12, 1352, 1375, 1427, 2370; Ex. DE, p. 37; St. Min. 117).

44. An orchestra leader, in playing an instrument, fills a requirement for an instrument in the orchestra just as any sideman does (194-95, 842, 1313-14, 1353, 1375-76, 3054-55).

45. Each time plaintiffs play instruments in the hotel steady or club date field they displace the services of a sideman who otherwise would have been engaged to play the same instrument that the particular plaintiff played (F.F. 43, 44; 609-10, 842, 958-62, 1194-95, 1313-14, 1353, 1375-76, 1778-79, 3657).

VI. Employment Relation in Television and Radio

46. For many years Federation has entered into collective agreements with the three major television and radio broadcasting networks, viz., Columbia Broadcasting System, Inc., American Broadcasting-Paramount Theatres, Inc., and National Broadcasting Company, Inc. In addition, Local 802 enters into collective bargaining agreements with stations owned by the networks and with various other independently owned stations, including WPIX (Exs. BLI-4, BM, BN, BT, IO, IP, KJ, KM).

47. The networks agreements result from joint negotiations with the three networks and similar individual collective bargaining agreements are entered into with each of the three networks (2256-66).

48. The network collective agreements relate primarily to two areas of broadcasting, viz.:

(a) Live and video tape broadcasting (Exs. BL 1-4) under an agreement dated May 18, 1964, for a term commencing March 1, 1964, and ending June 30, 1966; and

(b) the recording of musical services on television film (Ex. 10) pursuant to an agreement dated May 1, 1964, for a term commencing May 1, 1964, and ending April 30, 1969 (2258-59).

49. The cost of furnishing music is a considerable expense to the networks and other broadcasting stations (2258, 2302).

50. Pursuant to collective agreements, each of the network broadcasting companies engages approximately 100 musicians, including orchestra leaders, who perform services on a regular annual basis (2262-63, 2268-69, 2305-06; Ex. BL 1-4). The musicians so engaged are generally referred to as "staff musicians" (2264, 2268-69). The networks, in addition, also employ musicians on a single engagement basis (2264, 2292-93, Ex. BL 1-4).

51. With regard to the services of musicians, whether employed either on a staff or a single engagement basis, each network broadcasting company, through the director of music operations or producer of a show:

(a) hires the orchestra leader (2256-57, 2270, 2271, 2317);

(b) hires each of the sidemen (2256-57, 2271, 2272-73);

(c) decides, subject to union minimum requirements, on the numbers of leaders and sidemen who are to be engaged (2272-73);

(d) determines, subject to contractual obligation, the compensation of musicians (2326);

(e) selects the sidemen who will play for the orchestra leader (2272). (The musicians performing services for the broadcasting company play under the leadership of different orchestra leaders, some of whom are staff conductors and others, guest conductors (2269, 2277-78));

(f) determines the compositions to be played (2273-74);

(g) exercises control over the musical direction and decides how the orchestras are to render their pieces, including such things as tempo and variations in an arrangement (2275-76, 2280, 2311-12, 2319-20); sometimes the orchestra leader will provide guidance to the TV executive responsible for the program (2321);

(h) calls for rehearsals (2274);

(i) disciplines and discharges musicians who are unsatisfactory (2288-89, 2323; Ex. IP, pp. 13, 26);

(j) pays all expenses connected with the performances of the orchestras, including the cost of arrangements, the orchestra leader's salary, the sideman's salary, doubling, cartage fees, wardrobe allowance, extra compensation where makeup or costumes are required, transportation, insurance of instruments (2272-73, 2281-84, 2317; Exs. BL 1, 3, par. 5; BL 4, p. 9; IP, pp. 18, 20, 21; IO);

(k) furnishes paid vacations, meal periods and rest periods (2281-82);

(l) makes payments on behalf of the musicians to a pension welfare fund (Ex. BL 1, 3, par. 9; 2281);

(m) pays severance pay to laid-off musicians (2265).

52. The person vested with control over live and video tape broadcasts is the producer of the particular program involved. The producer of programs owned by the net-

works is an employee of the broadcasting company (2313-14).

53. Music for television films generally consists of background music which is inserted after the performance has already taken place and been captured on film. The persons responsible for the music on television film are the musical director and producer, both of whom are employed by the network broadcasting company (2284-86, 2319-20). The musical director, working in conjunction with the producer of a particular program, customarily does the following things with regard to the services of musicians:

(a) determines the type of music to be used in the film (2284-85, 2320);

(b) determines the persons who are to compose and arrange the music (2284, 2320);

(c) determines the orchestra leader to be used (2257, 2320);

(d) determines the sidemen to be used (2257, 2320);

(e) determines when the music is to be recorded on the tape which will be integrated with the film (2285-86); and

(f) supervises the integration of the music with the film so that the music sound track is coordinated with the filmed action (2286-88).

54. The broadcasting companies withhold and pay over to the appropriate governmental agencies the usual employer deductions for all musicians, including orchestra leaders (2271). On rare occasions (less than six times a year for CBS), a broadcasting company engages the services of a name band and a lump sum is paid to the orchestra leader in payment for his services and the services of the sidemen performing with him (2297, 2299-2300, 2323).

55. The minimum union wages and working conditions relating to single engagements for networks are set forth

in the collective agreements between the networks and defendant unions and are summarized in the booklet published by Local 802 entitled, "Price List Governing Single Engagements Radio and Television" (Ex. GJ; 2327).

56. The broadcasting companies have effective control over the rendition of services by musicians engaged by the broadcasting companies (2276-77, 2284-85, 2288, 2313-14, 2317, 2321).

57. Plaintiff Cutler performed services as a leader for a telecast by Station WPIX, New York (Ex. DR-3). Plaintiff Cutler was paid by separate check and all employer deductions were made by Station WPIX (id.). There is no evidence that the degree of control exercised by the broadcasting company over the services of the musicians on Cutler's engagement differed from the control exercised by the broadcasting companies over musicians as set forth above.

VII. Employment Relationship in Recording

38. Federation has entered into collective agreements with manufacturers of home phonograph records ("recording companies"). An agreement with recording companies expired December 31, 1963, and at that time an understanding had been reached between Federation and the recording companies with respect to the terms of a new collective agreement, which has not yet been reduced to writing (134-35).

59. The collective agreement between Federation and recording companies covers upwards of 1,000 recording companies and includes every major manufacturer of records in the United States and Canada (Ex. FG-1).

60. Federation has been certified by the National Labor Relations Board ("NLRB") as the collective bargaining agent for all musicians, including orchestra leaders, who perform services for recording companies (Ex. BE).

61. Musicians perform services for recording companies on a single engagment basis (1527, 2757).

62. Recording companies are in the business of manufacturing phonographs records which embody musical performances of members of defendant unions (1465-66, 1504, 2752-53).

63. An employee of the recording company known as the "artist and repertoire representative" (the "A&R man") has the ultimate responsibility for the musical product embodied in the phonograph recording. He actively participates in and has the last word in determining the nature of the various elements which comprise the recorded performance. In exercising this control the A&R man generally consults with the arranger-conductor and/or the vocalist, if any (2754-62, 2768-69, 2770-72, 2775-76, 1482, 1496, 1499-1502, 1504-05, 1508-11, 1518-11, 1522).

(a) A substantial number, probably a majority, of the popular recordings made feature vocalists rather than orchestras (2754, 2769, 523-24).

(b) The conductor of the orchestra used for recordings is also usually the arranger (2755, 1501-02).

64. The A&R man exercises the above-mentioned control over the following aspects of the preparation for the performance and the actual performance:

(a) selecting the orchestra leader (1501-02, 2754-55);

(b) determining the number and types of instruments to be used (1499-1501, 1518, 2754-55);

(c) employing a contractor to hire sidemen (the A&R man sometimes designates particular sidemen who are to be hired or avoided) (1518-19, 2756-58, 2762);

(d) deciding on the number and instruments of the musicians who are to perform (1503, 1518-19, 2754-56);

(e) determining the compositions to be played (1496, 1519-20, 2754-55);

(f) determining the seating arrangements and microphone placements for musicians (1504-05, 2758-60);

(g) determining when and where the actual recording session is to take place (1503-04, 2758, 2773); the recording session usually takes place at studios owned or leased by the recording company (id.);

(h) sometimes furnishing instruments to the musicians performing services (2764);

(i) determining the musical characteristics of the orchestra's performance including tempo, dynamics, tone coloring, volume, type of syncopation, and sometimes the nature of a sideman's performance (1508-11, 2761-62, 2763, 2775-76);

(j) sometimes requiring the addition of instrumentation to a recording after the original recording session ("sweetening"); often this subsequent sweetening takes place in the absence of the orchestra leader (1522).

65. All musical services must be performed to the satisfaction of the A&R man (1481-82, 1506-08, 1511, 2756, 2760, 2770, 2763). If the final recording does not meet with the approval of the A&R man, it will not be issued (1521, 2764).

66. The recording company pays compensation by individual checks payable to each of the musicians employed (2767-68, 2750; Ex. HP) or by a check payable to the leader or contractor for the total scale wages of leaders and sidemen which is transmitted to Local 802, less employer deductions (1491-91a, 1546-74, 2766-67). In the latter case, the recording company also senrs a payroll record designating the gross and net amount payable to each musician (id.; Ex. EN).

67. The recording company withholds and pays over to the appropriate governmental agencies federal and state

withholding taxes and social security taxes for all musicians, including the orchestra leader. The recording company also pays disability insurance for each of the musicians, including the orchestra leader (1494, 2750, 2786; Ex. HP). The recording company makes contributions to a pension welfare fund on behalf of each musician, including the orchestra leader (Exs. BS, pp. 29-30, EQ-ES).

68. Featured artists enter into royalty contracts with recording companies. Under those agreements there are deducted from the royalties otherwise owing to the featured artist, production costs such as wages paid to an orchestra leader; wages paid to sidemen; costs of arranging and composing, and the wages of choral groups (1541-42, 2784-86). If there are no royalties or an insufficient amount of royalties, the recording company bears these expenses without reimbursement (1542, 2784).

69. The recording company enters into a Form B Contract with the orchestra leader with respect to each recording session at which phonograph records are made (2765-66, Exs. DH, HO), which provides that the "employer [record company] shall at all times have complete control over the services of employees under this contract and the leader shall, as agent of the employer, enforce disciplinary measures for just cause, and carry out instructions as to selections and manner of performance" (id.).

70. Cutler performed as a leader in the making of a recording (St. Min. 83-84). There is no evidence that Cutler's manner of performance and the degree of control by the recording company differed from that referred to above.

71. Paragraph 12(d) of the collective bargaining agreement between the recording companies and defendant unions provides (Ex. BS):

"All present provisions of the Constitution, By-Laws, rules and regulations of the Federation (except those relating to requiring membership in the Federation) are made

a part of this agreement to the extent to which their inclusion and enforcement as part of this agreement are not prohibited by any present existing and valid law. No changes in the Federation's Constitution, By-Laws, rules and regulations which may be made during the term of this agreement shall be effective to contravene any of the provisions hereof."

72. The recording company has genuine and effective control over the rendition of services by musicians engaged by it including the orchestra leader.

VIII. Minimum Price Regulations

73. Local 802's "Price List" Booklet requires each sideman to be paid minimum wages for single or steady engagements. Their wages are based upon a number of factors, including the type of engagement involved; the number of hours played; whether the sideman plays more than one instrument; whether playing is continuous or non-continuous; whether the musicians has to transport certain bulky instruments; whether the musician is required to furnish an organ or music folios; whether the musician is required to rehearse; whether there is a show lasting more than twenty minutes; and whether uniforms (other than tuxedos) must be furnished by the musicians (Stipulated Fact 14).

74. Local 802's "Price List" Booklet requires each leader to receive certain minimum compensation for the services rendered by him. Thus, Rule 1, of the Price List Booklet provides as follows:

"Rule 1. 'Regulations for Establishing Leaders' Fees in Single Engagement Unless Otherwise Provided For,' "

"A. An engagement played by one members shall charge in addition to the Union Scale of the engagement 25 per cent additional as Leader (Personnel Manager) fee.

"B. An engagement played by two members shall charge in addition to the Union scale of the engagement 50 per cent additional as Leader (Personnel Manager) fee.

"C. An engagement played by three members shall charge in addition to the Union scale for the engagement 75 per cent additional as Leader (Personnel Manager) fee.

"D. Where four or more men are employed the Leader shall charge and receive double the regular scale, i.e., 100 per cent additional as Leader (Personnel Manager) fee." (Stipulated Fact 17.)

75. Similarly, Local 802's "Price List" Booklet provides as to steady engagements:

"RULE 10. On all steady engagements the Leader (Personnel Manager) shall charge 25 per cent additional when only one (1) man is employed, 50 per cent additional when two (2) men are employed, 75 per cent additional when three (3) men are employed, and for all engagements of four (4) men or more he shall charge double the price per man, except where otherwise provided." (Stipulated Fact 18.)

76. Local 802's "Price List" Booklet provides that the subleader shall receive the following as his minimum wage for single engagements:

"RULE 2. In the absence of the Leader (Personnel Manager), the member representing him for any part or all of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided.

"A. On all outside (Single) engagements, on which the orchestra is called upon to rehearse and/or play a show and for which there is an extra charge. The Musician who actually conducts the rehearsal and/or show shall receive double the extra charge regardless as to who contracts the engagement, number of musicians employed or who stands in front of the orchestra." (Stipulated Fact 24.)

77. Similarly, in connection with steady engagements the "Price List" Booklet provides:

"RULE 11. In the absence of the Leader (Personnel Manager), the member representing him for all or part of the engagement shall receive one-half the extra charge made in conformity with Rule 1, unless otherwise provided." (Stipulated Fact 25.)

78. Thus, the subleader must receive as his minimum wages for conducting a four-piece band on a single engagement, one and one-half times the sideman's scale, or double the sideman's scale if a rehearsal or show is involved. (Stipulated Fact 26.)

79. Local 802 not only establishes minimum compensation for sidemen and orchestra leaders on single and steady engagements, but also requires orchestra leaders to charge purchasers prices which are not less than the aggregate of the minimum compensation payable to sidemen and leaders (Exs. 178, 179, 186-195; Stipulated Fact 27).

80. Other locals also set per man and leader minimum wages (Exs. 173-77).

81. The resolutions of May 17, 1960, and October 27, 1960:

(a) In the club date field establishments are classified by Local 802 as "Class A" or as "Special Class." Class A rates are higher than Special Class.

(b) In March 1960, resolutions were submitted by members of Local 802 for consideration at the April Price List meeting. One of the resolutions so submitted provided that the minimum scale wages of sidemen performing services on Class A club dates would be increased (Ex. Q).

(c) The April 1960 Price List meeting was scheduled to take place on April 18, 1960. Prior to the April Price List meeting, plaintiff Cutler, as well as other leaders, made

known to Local 802 officers objections to the adoption of the proposed resolutions (1229-30, 1397-1402).

(d) The April Price List meeting was adjourned for lack of a quorum (Ex. LI). The Executive Board, on May 17, 1960, passed the resolutions referred to above, to become effective with respect to club date engagements booked after June 15, 1960 (Exs. LI and JQ). Such action was taken pursuant to a standing resolution in the By-Laws granting to the Executive Board authority to adopt price list resolutions where they were not acted upon at a price list meeting because of the absence of a quorum (3263; Ex. 12, Section 3, p. 57).

(e) After the increase in rates for club date Class A engagements became effective, members of Local 802 appeared and requested that Special Class engagement minimum rates be increased in order to maintain the traditional differential between Class A and Special Class club date engagements (3246-65).

(f) On October 29, 1960, the Executive Board adopted a resolution increasing the rates of Special Class club dates (Stipulated Fact 16; Ex. CE).

82. Local 802, in order to insure that minimum wages and other working conditions are being observed, employs approximately 30 business representatives whose function it is to visit establishments at which members of defendant unions are engaged (622-23, 666, 3834).

83. Local 802 also furnishes to its members in certain fields (e.g., the club date field, the broadcasting field) "Price List" booklets which set forth the minimum wages and working conditions in those fields.

IX. Minimums

84. Local 802 has regulations requiring the employment of minimum numbers of musicians for the various rooms of hotels, catering establishments and ballrooms in the club

date single engagement field. These regulations vary according to the establishment, function, day and time and apply to all club date single engagements attended by more than 75 persons (Exs. 178-185; 3238-39).

85. Federation and Local 802 have been parties to collective agreements with the purchasers of music for certain steady engagements pursuant to which the purchasers have agreed to employ a specified number of musicians (Network Television Agreement, EX BL 1-3; Radio City Music Hall Agreement, Ex. BH; Philarmonic Agreement, Ex. BZ-1; Metropolitan Opera Agreement, Ex. CB).

X. Form B Contract

86. Article 13, Section 33, of Federation's By-Laws provides:

"Members of the A. F. of M. are not permitted to sign any form of contract or agreement for an engagement other than that issued by the A. F. of M." (Ex. 300).

The form of contract issued by the AFM is the Form B Contract (Exs. Y, Z, EC).

87. The Form B Contract was first adopted in 1941 (Ex. Y, Art. XVI, pp. 170-179). It was recommended in order that orchestra leaders could qualify for social security benefits (3375). The language of the Form B Contract was formulated after discussions with the Treasury Department (Ex. EC 44-45) and then submitted to the Commissioner of Internal Revenue for a ruling on the question of liability for Social Security taxes (Ex. EC 45-46). The Commissioner ruled that the hotel employing the musicians in question was the employer for purposes of the Social Security tax (Ex. EC 47).

88. Since 1941, the Form B Contract has been amended from time to time and at present there are various types in use for different types of engagements. Each type desig-

nates the purchaser of the music as the employer and the leader as an employee (Exs. Z, Z-1, Z-2, DF-DI).

89. Article 16, Section 1A, of Federation's By-Laws provides that on traveling engagements (Ex. 300):

"A. Any individual member, or leader, in every case before an engagement is played, must submit his contract for same to the local union in whose jurisdiction same is played, or in the absence of a written contract, file a written statement with such local fully explaining therein the conditions under which same is to be fulfilled, naming the place wherein same is to be played, the amount of money contracted for, the hours of the engagement, as well as the names of the members who will play same and the locals to which they belong, the actual amount of money paid each individual sideman, which cannot be less than the wage scale specified in Article 15 of these By-Laws and (except in Canada) their Social Security numbers."

The written contract referred to is the Form B contract (Ex. 300, Art. 13, § 33).

90. Local 802, in practice, does not require the use of the Form B Contract on club date single engagements; it accepts reports (in person, by telephone, or by mail) of details of the agreement sufficient to show that union scale has been complied with. It also accepts contracts other than Form B Contracts (656-63, 3597-99). In addition, it accepts contracts (Form B or other types) which specify as the total price or wage "union scale" rather than any dollar amount (3597-3604, 3837).

91. Local 802 does require the use of the Form B Contract on steady engagements, although it does not insist that a Form B Contract be filed prior to every engagement (665-66).

92. Any member failing to use the Form B Contract, where it is required in practice, is subject to penalty (Stipulated Fact 30).

93. Local 802 requires that an engagement as a leader shall not be effective unless first approved by the Executive Board (Ex 165, Art. 4, § 5).

XI. Regulations Pertaining to Traveling Members

A. 10% Surcharge

94. A tax called the "10% Traveling Surcharge" was assessed by the AFM on engagements played by members outside the jurisdiction of their home Local until 1964 (Ex. CM, Art. 15, § 1).

95. The 10% Traveling Surcharge was defined in the Constitution and By-Laws of the AFM as "An additional 10% based on the price of the Local in whose jurisdiction the engagement is being played * * * added to the price [of the engagement] * * *" (Ex. CM, Art. 15, § 3).

96. Federation's By-Laws provided that the leader was responsible for collecting and transmitting the traveling surcharge tax to Federation (Ex. CM, Art. 15, Sec. 7) and that the tax was to be distributed as follows: 4/10 was to be retained by Federation, 4/10 was to be paid to the local in whose jurisdiction the traveling engagement took place, and 2/10 was to be distributed to members of the orchestra playing the engagement (id.).

97. In April 1963, AFM's 10% Traveling Surcharge tax as it was then administered was held by the Second Circuit to violate Section 302 of the LMRDA in Cutler v. AFM, supra.

98. Federation's June 1963 Annual Convention adopted a resolution abolishing the traveling Surcharge tax, effective January 1, 1964 (Ex. LG).

99. At the June 1963 Convention, a new 10% wage differential on traveling engagements (the "Traveling engagement wage differential") was adopted. Article 15 of the 1964 Federation By-Laws provides that in the case of a

steady traveling engagment the "minimum wage to be charged and received by any member" shall be "no less than the wage scale of the local in whose jurisdiction the services are rendered, plus 10% of such local wage scale"; and that, in the case of a single engagement, the minimum wage to be charged and received shall be "no less than either the wage scale of the local in whose jurisdiction the services are rendered or the wage scale of the home local of the member performing such services, whichever is greater, plus 10% of the wage scale of the local in whose jurisdiction the engagement takes place" (Ex. 300, Art. 15, § 2).

100. The purpose of the traveling engagement wage differential is to protect work opportunities for local musicians within their respective local union jurisdictions (3675, 3725-28).

B. Illustration of Application of the Traveling Engagement Wage Differential-Engagements Performed by Local 802 Members in Local 38, Westchester

101. The Local 802 scale for club dates is higher than the union scale in the jurisdiction of Local 38, Westchester County, New York (741).

102. Pursuant to Article 15, Section 2, of Federation's By-Laws, members of Local 802 who perform club date single engagements in the jurisdiction of Local 38 in Westchester County are required to charge the Local 802 scale plus 10% of the Local 38 scale (Ex. 300).

103. As a result of the higher Local 802 scale and the 10% wage differential, the minimum union scale price which must be charged by a Local 802 orchestra leader performing in the jurisdiction of Local 38 is higher than the minimum union scale price which must be charged by a Local 38 leader performing in the same jurisdiction.

104. Notwithstanding the differential in scale price in favor of Local 38 members, Local 802 members, including

plaintiff Cutler, have performed engagements in the jurisdiction of Local 38, both prior and subsequent to 1960 increases in Local 802 scale (Exs. GK-GT, HE, HF, LI, JQ, CE, GK-GR; 2572-91; Stipulated Fact 16). Plaintiff Cutler, both before and after the 1960 increases in Local 802 scale, almost with out exception, bid for jobs in Westchester at prices in excess of union scale (2587-90).

C. Restrictions on Job Solicitation by Traveling Members

105. Under Federation's By-Laws a traveling member performing a steady traveling engagement is not permitted to solicit or accept a single engagement either in or out of the jurisdiction in which the steady engagement is being played during the tenure of the steady engagement (Ex. 300, Art. 17, § 14).

106. Under Federation's By-Laws, a member of a local may not form a traveling orchestra to compete with or fill engagements in his home local (Ex. 300, Art. 17, § 24). For exeample, a member of Local 802 may not form an orchestra to perform an engagement within Local 802's jurisdiction unless that orchestra consists entirely of members of Local 802.

107. Traveling orchestras which establish headquarters in the jurisdiction of any Local are not permitted to compete for or accept and play engagements in that jurisdiction (Exs. CM, 300, Art. 17, § 23).

108. An out-of-town orchestra leader playing a steady engagement in a particular jurisdiction is prohibited from playing a single engagement in that jurisdiction for some other client during the period of the steady engagement (Exs. CM, Art. 17, § 14; 300, Art. 17, § 14) or remain in the jurisdiction after completing a steady engagement to solicit another steady engagement (Exs. CM, Art, 17, §17; 300, Art. 17, § 17). Nor many members of a traveling orchestra be used by the manager of a company with which they travel, or by the local employer, to displace the local orches-

tra or any member thereof, if the displacement interferes with the contract under which the local orchestra is employed (Exs. CM, Art. 16, § 31; 300, Art. 16, § 27).

109. A traveling band may not play a radio or TV engagement which is local in character (not on a network) (Ex. CM, Art. 23, § 1).

D. The Local Work Dues Equivalent

110. Since January 1, 1964, Federation's By-Laws have provided for the payment by traveling members of local work dues equivalents to locals which require such payments. Local work dues equivalents are payments equal in amount to the work taxes which locals impose upon their own members in connection with earnings from jobs performed within the jurisdiction of such locals. Such payments are based upon a percentage of the members' earnings from such jobs (Ex. 300, Art. 2, § 8(c)).

111. Prior to January 1, 1964, Federation's By-Laws provided that traveling members could not be required to pay local work dues equivalents on engagements to which the Federation traveling surcharge tax applied (Ex. CM, Art. 16, § 26).

112. Under Federation's By-Laws, local work dues equivalents may be imposed only by a local which "uniformly requires its own members to pay the same percentage of their scale wages in connection with the rendition of the same classification of services" (Ex. 300, Art. 2, § 8(c)). Local work dues equivalents may not exceed 4% of scale wages and may not be imposed on wages of traveling members "derived from symphony or opera services" (Ex. 300, Art. 2, § 8(E), (F)).

E. Transfer Members

113. Under Federation's By-Laws, a member of one local who moves his residence to a place within the jurisdiction

of another local and who indicates his wish to become a member of such other local, is called a transfer member (Ex. 300, Art. 14); and Federation locals are required to accept applications to grant full membership to transfer members who have resided in their jurisdictions at least six months (id., § 2).

114. Under Federation's By-Laws, Art. 14, a transfer member may not solicit or perform any steady engagement within that local's jurisdiction for a period of three months after the date he is granted transfer membership (id., § 7). He is also prohibited from performing engagements outside the jurisdiction of the transfer local, except that he may do so with orchestras consisting of members of the transfer local after three months (id., §§ 8, 9).

XII. Booking Agents

115. Persons who act as "bookers, agents, representatives and managers of members, orchestras or bands, or who secure engagements and contracts for such members, orchestras and bands" are referred to as "booking agents" (Ex. 300, Art. 25, § 1).

116. Since 1936, Federation has required booking agents to enter into license agreements with Federation as a condition to representing or acting in behalf of Federation members (3370-73; Ex. JX).

117. Pursuant to the provisions of Federation's By-Laws, each such booking agent must enter into a standard form of license agreement with Federation under which he agrees not to charge more than 10% commission on steady engagements, a 15% commission on single engagements, not to book non-union musicians, and not to book orchestras for less than union scale wages and working conditions (3373-74; Ex. 300, Art. 25, pp. 151-59). Federation makes no charge for the license agreement (533, 999).

118. The regulation of booking agents was considered at Federation's 1936 Convention. At that time, many booking agents charged exhorbitant fees to members and booked engagements for musicians at wages which were below union scale (1016-17, 1121-24, 3370-73). The President's report made at that Convention stated (Ex. JX):

"Many booking offices or agents do not now charge the standard wage for musicians and, in other cases where they do so, same is not paid to the musicians. This condition could only develop with the connivance of some contracting members or leaders who, in collusion with agents, frustrate the efforts of the union to enforce its wage scale. These leaders, or contracting members, by thus violating the laws of their organization, gain an advantage over other leaders in securing employment. As a result, a great percentage of the orchestras doing jobbing work or filling casual engagements, play for less than the union scale, and, in cases where the union tries to control the situation through the deposit of contracts with the union, false contracts are often deposited."

119. Following the submission of that report, Federation adopted provisions relating to booking agents which are substantially the same as those presently in eect (3370-74). Subsequent to the adoption of the regulations governing booking agents, the abuses just referred to were, to a large extent, eliminated (1017, 1123-24).

XIII. Caterers

120. Many club date single engagements take place in catering halls which are rented by purchasers of the music. Catering halls do not supply orchestras, but some proprietors of catering halls recommend particular orchestras to prospective purchasers and receive commissions from the orchestra leaders (757-59, 773-74, 2330-5, 2361-63, 3246-48).

121. Local 802's By-Laws contain the following standing resolution (Ex. CJ, pp. 75-76):

"A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar establishments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.

"B. Caterers or establishments violating the above may be placed on the Unfair List for such time and under such conditions as shall be determined by the Executive Board.

"C. The payment or promise of payment, or any gift or consideration whatever, to the above is contrary to the principle of fair competition among members of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars ($500.00) or suspended, or both."

This standing resolution has been in effect for approximately fifteen years (3246).

122. In 1947, prior to the adoption of the By-Laws relating to caterers, Local 802 appointed a committee to investigate conditions in hotels and catering halls. The committee's preliminary report, which was printed in the February 1947 issue of ALLEGRO, stated (Ex. JN):

"The objective of this committee's important assignment can be stated simply: the elimination of the caterer from the music business and the restoration to the musician of his right to earn a living without any restrictions and pressures upon him. Your committee believes, and knows that in that belief it reflects the unanimous opinion of the membership, that all money spent for music should go to musicians and not to chiselers. We oppose any caterer booking orchestras because that obviously leads to a depressing of union scales. The caterer must be barred from compelling people to use a specific orchestra."

The committe found evidence of "monopoly" and "collusion."

XIV. Collective Bargaining

123. Defendant unions do not bargain collectively with purchasers of music or with orchestra leaders with respect to wages and working conditions applicable to single engagements (26, 252-54, 3262; St. Min. 581-82).

124. Defendant unions have for many years bargained collectively with purchasers of music in various non-club date fields (2984-95). Thus, there are presently in effect (or have recently expired and are in the process of negotiation), among others, the following collective agreements to which either or both of the defendant unions are parties:

(a) Collective agreement between Federation and phonograph recording companies, effective January 1, 1959 (Ex. BS).

(b) Collective agreements between Federation and both NBC and CBS covering network radio and television, dated May 18, 1964 (Ex. BL-1, BL-3).

(c) Collective agreements between Federation and both NBC and CBS covering local radio and television, dated May 18, 1964 (Ex. BL-2, BL-4).

(d) Collective agreement between Federation and television film producers (blank form) (Ex. IM).

(e) Collective agreement between Federation and various makers of television video tape, effective July 1, 1964 (Ex. HX).

(f) Collective agreement between Federation and television film producers (Ex. HY).

(g) Collective agreement between Federation and television producers relating to pay television motion pictures (Ex. HZ).

(h) Collective agreement between Federation and television video tape producers (Ex. BN).

(i) Collective agreement between Federation and Independent Motion Picture Producers (Ex. BO).

(j) Collective agreement between Federation and Producers of Non-Theatrical Documentary & Industrial Films (Ex. BQ).

(k) Collective agreement between Federation and advertising agencies covering television and radio commercial announcements (Ex. BT).

(l) Collective agreement between Federation and producers of electrical transcriptions (Ex. BV).

(m) Collective agreement between Local 802 and The League of New York Theatres, Inc., dated June 25, 1964 (Ex. BI).

(n) Collective agreement between Local 802 and Shubert Interests Operating Legitimate Theatres in New York City, dated September 2, 1963 (Ex. BJ).

(o) Collective agreement between Local 802 and both American Export Lines Inc. and United States Lines Co., dated April 24, 1963 (Ex. IB, IB 1).

(p) Collective agreement between Local 802 and Radio City Music Hall, dated September 30, 1963 (Ex. BH).

(q) Collective agreement between Local 802 and The Metropolitan Opera, dated July 1, 1961 (Ex. CB).

(r) Collective agreement between Local 802 and the Philharmonic-Symphony Society of New York (Ex. BZ, BZ 1).

(s) Collective agreement between Local 802 and New York City Opera, dated March 12, 1962 (Ex. BX).

(t) Collective agreement between Local 802 and New York City Ballet, dated March 1, 1962 (Ex. BY).

(u) Collective agreement between Local 802 and Music Publishers Protective Ass'n, Inc., dated September 21, 1964 (Ex. IC).

(v) Collective agreement between Local 802 and hotels or restaurants (Ex. BK)..

(w) Collective agreements between Local 802 and Cafe Geiger dated November 16, 1962, with letter of correction dated April 17, 1963 annexed (Ex. IA).

(x) Collective agreement between Local 802 and Michael Gaynor, regarding Flatbush Terrace, dated January 24, 1964 (Ex. CV).

(y) Collective agreement between Federation and the three major networks relating to TV film, dated as of May 1, 1964 (Ex. IO).

(z) Collective agreement between Local 802 and National Broadcasting Company, Inc., dated August 5, 1955 (Ex. IP).

(aa) Collective agreement between Local 802 and WNEW Radio New York, dated July 23, 1964 (Ex. KL). Similar agreements have been entered into with other stations (Exs. KJ, KK).

125. The collective agreements referred to above set forth the hours and working conditions of all musicians, including orchestra leaders, covered by those agreements. Those agreements were the result of negotiations between Federation or Local 802, or both of them, and the purchasers of music, or an association of purchasers of music (2995, broadcasting 2258-66; theatres 2992-93; steamships 3225-27; Radio City Music Hall 3020-22; Metropolitan Opera 2852-55; New York Philharmonic 3192-3; New York City Center Opera 2992; New York City Center Ballet 2992; hotels, restaurants and night-clubs 2988-89, 2991-92, 3197-3205, 3210, Exs. IT-JB).

126. Defendant unions, before bargaining collectively with the purchasers of music, conducted meetings of their

members to formulate the demands to be bargained for (hotels, restaurants and nightclubs, 3214-17, Ex. JC; Yorkville restaurants, 3224; steamships, 3226; theatres, 3283). No special invitations were sent to orchestra leaders to participate in the negotiations with the purchasers of the music (891-892, 1060). Upon completion of negotiations with purchasers, but prior to the execution of the collective agreement, members of defendant unions were given the opportunity to approve or disapprove of the proposed agreement (television networks 3183-4, Ex. II; recordings 3184-5, Ex. JT; television film (3186-87, Ex. IN; Radio City Music Hall 3022; New York Philharmonic-Symphony Society of New York, Inc. 3193; hotels, restaurants and nightclubs (3219-3222, 3225, Ex. JD).

XV. Monopoly

127. Defendant unions endeavor to foreclose non-union orchestra or leaders from the music field principally by not permitting members to play in the same orchestra as non-members (Ex. 300 Art. 13, §§ 5-7; Art. 18, § 26; Ex. 165, Art. 4, § 1 (h)), by not permitting members to deal with unlicensed booking agents (Ex. 300, Art. 25, §§ 4, 22), by not permitting licensed booking agents to book engagements for non-members (Ex. 300, Art. 25 at p. 151), by securing the cooperation of television companies (2314-15), record companies (1469) and hotels (1704-06, 2341) in not hiring non-union bands and by precluding non-members from entering Local 802's exchange hall where sidemen are hired for engagements (2108).

DISCUSSION

I. Class Action

Plaintiffs claim that they represent a class of orchestra leaders largely engaged in the single engagement field who (a) are employers who regularly employ sidemen or employee musicians who are members of AFM, Local 802,

or another Local affiliated with AFM; and (b) are independent contractors largely engaged in the single engagement field. (Complaints, 60 Civ. 2939, par. 24; 60 Civ. 4926, par. 17) It is also alleged that "this complaint raises common rights; and a common relief is sought herein; and the object of this action is the adjudication of claims which do or may seriously affect the specific property rights of plaintiffs and of said class * * *." (Complaints, 60 Civ. 2939, par. 23; 60 Civ. 4926, par. 16)

The class action is defined in Rule 23(a), Federal Rules of Civil Procedure:

"Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

The three categories of class actions in Rule 21(a), (b), (c) are called respectively "true," "hybrid" and "spurious." Under the prevailing view a judgment in the true class action is conclusive on all members of the class represented, in a hybrid class action on all members of the class as to rights in the res, and in a spurious class action on only the persons named as parties. Dickinson

v. Burnham, 197 F.2d 973, 979 (2d Cir.), cert. denied, 344 U.S. 875 (1952) and cases cited. Since Hansberry v. Lee, 311 U.S. 32, 43 (1940), commentators have urged the abolition of these distinctions in the effect of a judgment in the three types of class suits. Dickinson v. Burnham, supra at 979. The view advocated is reliance on the test of adequate representation to determine whether absent parties should be bound. Rank v. Krug, 142 F.Supp. 1, 154 n. 93 (D. Cal. 1956), modified on other grounds, California v. Rank; 293 F.2d 340 (9th Cir. 1961), modified on other grounds, Dugan v. Rank, 372 U.S. 609; Fresno v. California, 372 U.S. 627 (1936).

These divergent views have important practical ramifications. Since under the current view only the parties to the action are bound in a spurious class action, the issue of whether they adequately represent a class is only important as it relates to the right to intervene. York v. Guaranty Trust Co. of N.Y., 143 F.2d 503, 528, n. 52 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945). It is merely a device for permissive joinder. Carroll v. Associated Musicians of Greater New York, 206 F.Supp. 462, 469-70, 51 LRRM 2310 (S.D.N.Y. 1962), aff'd, 316 F.2d 574, 53 LRRM 2063 (2d Cir. 1963).

Nevertheless, I find that plaintiffs fail to adequately represent the class they purport to represent. This suit is part of a series of suits in which the same orchestra leaders are leading a challenge to various union activities. The present suit challenges many phases of union regulation. If successful in all respects it would substantially weaken the union. It would not be surprising if there was a division among the orchestra leaders in the union on this subject. The complaints themselves indicate that some orchestra leaders willingly cooperate with the union (e.g., Complaint, 60 Civ. 4926, pars. 24, 15, 41). Hansberry v. Lee, 311 U.S. 32 (1940); Giordano v. R.C.A., 183 F.2d 558, 26 LRRM 2380 (3rd Cir. 1950).

This question of conflict among the members of the proposed class was treated in three prior decisions involving musicians unions. In all, it was a basis for rejecting the propriety of a class suit. Associated Orchestra Leaders of Greater Phila. v. Philadelphia Musical Soc., 203 F.Supp. 755, 757, 49 LRRM 3043 (E.D.Pa. 1962); Cutler v. AFM, 211 F.Supp. 433, 444-45, 51 LRRM 2729 (S.D.N.Y. 1962), aff'd, 316 F.2d 546, 53 LRRM 2060 (2d Cir.), cert. denied, 375 U.S. 941, 54 LRRM 2715 (1963); Carroll v. Associated Musicians of Greater New York, supra at 470-71.

Moreover, the plaintiffs do not adequately represent certain orchestra leaders whom they purport to represent. They lack certain characteristics that distinguish "name" bands:

(1) Distinctive musical styles based on the arrangements used by the band and, perhaps, the style of the leader as a soloist;

(2) National reputations; and

(3) Leaders who always appear and never use subleaders.

These characteristics would be relevant in any evaluation of the status of the name bandleaders under the antitrust laws.

The class suit or at least the representation of persons other than the parties to the suit fails on other grounds.

Rule 23(a)(1) requires that members of the class have a joint, common, or secondary right. The present suit clearly does not qualify, since the rights sought to be enforced are several and not secondary or derivative in nature.

Rule 23(a)(2) permits a class action where the rights of the members of the class are several and the action

involves claims to specific property. No specific property will be affected by the present suit, hence, this provision is ineffective as support for a class suit here.

Rule 23(a)(3) provides for the spurious class suit. As was observed earlier, such a suit binds only the parties to the action and is efficacious only as a device for permissive joinder. Therefore its is irrelevant whether this suit qualifies as a spurious class suit since no questions of joinder are now presented. Whether or not a spurious class action, only the parties will be affected. See Moore, 3 Federal Practice 3444-45, 3465 (2d ed. 1964).

Therefore, this action will be traeted as affecting only the actual parties.

II. Alleged Antitrust Violations

The plaintiffs charge that the following acts of defendants violate the antitrust laws:

(1) pressuring orchestra leaders into the union;

(2) imposing minimum price regulations on orchestra leaders;

(3) imposing minimum numbers of sidemen requirements on orchestra leaders;

(4) requiring the use of the Form B Contract;

(5) imposing restrictions on traveling orchestras;

(6) failing to bargain collectively;

(7) regulating booking agents and caterers;

(8) monopolizing the music industry.

The plaintiffs' position as stated in the complaints is that these acts constitute a violation of the antitrust laws because they represent a combination between a union and orchestra leaders, including the unwilling plaintiffs, in restraint of trade.

III. Antitrust—Labor Law

With the benefit of "the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict" the Supreme Court first stated the current extent of organized labor's liability under the antitrust laws in United States v. Hutcheson, 312 U.S. 219, 7 LRRM 267 (1941). The Court read "the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." Id. at 231

Exercising logic which has been much discussed since the decision, the court stated: "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act," id. at 236, and concluded that "so long as a union acts in its self-interest and does not combine with non-labor groups" the conduct enumerated in Section 20 of the Clayton Act was not a violation of the Sherman Act.

The statement of the exemption was further developed in Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, 325 U.S. 797, 16 LRRM 798 (1945). The court said that the Norris-LaGuardia Act "emphasized the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid and protection.' " Id. at 805. However, the court held that unions could not, "consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." Id. at 808.

The meaning of the term "non-labor" group has been developed in a series of cases dealing with the issue of whether a union could organize and regulate independent contractors. Los Angeles Meat Drivers Union v. United

States, 371 U.S. 94, 51 LRRM 2448 (1962); Milk Wagon Drivers Union v. Lake Valley Farm Prods., 311 U.S. 91, 7 LRRM 276 (1940); United States v. Fish Smokers Trade Council, Inc., 183 F.Supp. 227, 38 LRRM 2399 (S.D.N.Y. 1960); Cf., Bakery Drivers Union v. Wohl, 315 U.S. 769, 8 LRRM 457 (1941). Applying the Norris-LaGuardia Act, a search was made in these cases for a "labor dispute" within the meaning of that Act to determine whether an exemption from the Sherman Act was available. The criterion used was the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a "labor group" and party to a labor dispute under the Norris-LaGuardia Act. Hence, the Sherman Act was inapplicable to any combination between the union and the independent contractors.

The ultimate issue in determing whether a relationship exists which would exempt conduct complained of from the Sherman Act is whether the Work and functions performed by the independent contractors actually or potentially affect the hours, wages, job security or working conditions of the union members in the same industry. If so, the union may combine with the independent contractors by including them in the union and subjecting them to union regulation. Los Angeles Meat Drivers Union v. United States, supra; United States v. Fish Smokers Trade Council, Inc., supra at 234.

Since the scope of the union exemption from the Sherman Act is defined by its self-interest in collective bargaining and protecting and improving conditions of employment, the activities complained of by plaintiffs will be proper if they relate to such legitimate union interests and are not carried on in combination with a non-labor group. "[T]he same labor union activities may or may not be

in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups." Allen-Bradley Co. v. International Bhd. of Electrical Workers, supra at 810.

IV. Labor Or Non-Labor Group?

A glance at the list of alleged illegal practices suggests that the legality of two of them depends on whether the plaintiffs comprise a non-labor group. This issue will be examined prior to considering the legality of the individual practices.

If employees, the plaintiff orchestra leaders are certainly a labor group. If employers or independent contractors, they will be a labor group only if they meet the test of job or wage competition or other economic interrelationship which was just discussed. For the purposes of examining the status of the orchestra leaders under the antitrust laws in the club date and hotel steady engagement fields, it will be assumed, without deciding, that they are employers or independent contractors. See Cutler v. AFM, supra; Carroll v. Associated Musicians of Greater New York, supra.

A. Club Date and Hotel Steady Engagement Fields

I find that in the club date and hotel steady engagement fields the plaintiff orchestra leaders are in competition with employee members of the defendant union regarding jobs, wages and other working conditions. As a result, they comprise a labor group in these fields.

The evidence in this case discloses that plaintiffs made a practice of leading their own bands and, except for Peterson, often played instruments too. They also regularly booked more than one engagement for an evening, in which case they used subleaders to direct their orchestras.

In operating in this manner plaintiffs perform functions identical to acknowledged employees who were also union members—subleaders and sidemen. Moreover when one of the plaintiffs personally led his band he occupied a job that was a potential position for a subleader. When a plaintiff played an instrument as well as conducted, he filled a slot that was a potential job for a sideman and also displaced a subleader.[2] In displacing sidemen and subleaders from potential jobs, plaintiffs engaged in job competition with them.

As a consequence of this relationship, the practices of plaintiffs when they lead and play must have a vital effect on the working conditions of the non-leader members of the union. If they undercut the union wage scale or do not adhere to union regulations regarding hours or other working conditions when they perform, they will undermine these union standards. They would put pressure on the union members they compete with to correspondingly lower their own demands. The evidence disclosed that plaintiff Levitt actually did lead a band at a steady engagement at a dance hall for which he received less than the subleader's union minimum wage. (3323-24)

B. Other Fields (Television, Recording and Concerts)

Although virtually all of the plaintiff's time is uesd in playing club dates and hotel steady engagements, for the sake of completeness the other fields in which plaintiffs have engaged will now be considered.

Plaintiff Cutler has made one or two recordings and has had a television engagement. Plaintiff Peterson has had some concert engagements.

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[2] If a subleader could be found who played the instrument usually played by the leader, then only a potential subleader's job would be lost.

In the concert field there is not sufficient evidence from which findings can be made either as to the status of Peterson as an employee or independent contractor, or as to the existence of job or wage competition. He has not met his burden of proof in this regard.[3]

In the television and recording fields the evidence is inadequate to support findings as to job or wage competition. Further, an orchestra leader's status here is quite different from his position in the club date or hotel steady engagement field. It is not fruitful to assume that they are independent contractors. Therefore, in order to determine whether plaintiff Cutler was included in a non-labor group in these areas it will be necessary to consider whether he is an independent contractor or an employee.

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[3] It is unlikely that Peterson could show an antitrust violation in the concert area. His status in this field is relevant to two charges: pressuring leaders into the union and fixing minimum prices.

Since leading at concerts constitutes only a very small percentage of Peterson's activities and the rest of his business is conducted in a manner which justified the pressure to join the union, the fact that Peterson might be a "non-labor" independent contractor in the concert field is immaterial. The union would still be entitled to attempt to induce or force him to join.

Further, if Peterson only organizes the concerts and does not personally conduct or play, as has been his practice since expulsion, he has failed to establish that in this capacity pressure was, in fact, exerted on him to join the union. See V, infra. If Peterson actually conducts at the concerts, then it is likely that he is in job and wage competition with subleaders and a member of a labor group. As such, he would be a proper subject for unionization. See V, infra.

Regarding the charge of minimum price fixing, if Peterson does not conduct or play at concert engagements, this charge would be treated the same as it would in the club or hotel steady field. See VI, infra. There would be no antitrust violation. If Peterson does conduct at concert engagements, as stated above, he would probably be a member of a labor group and a proper subject for union regulation.

This issue must be resolved by examining the degree of control which is exercised over the details of the service rendered by the orchestra leader and the factors which make up the economic reality of the relationship, e.g., "the permanency of the relation, the skill required, the investment in the facilities for work and opportunities for profit or loss." Bartels v. Birmingham, 332 U.S. 126, 130 (1947); United States v. Silk, 331 U.S. 704 (1947).

In contrast to the role of the orchestra leader in the single engagement field, Cutler v. United States, 180 F. Supp. 360 (Ct. Cl. 1960), the evidence discloses that in television and recording the orchestra leader is subject to considerable artistic supervision. An employee of the television or record company is charged with directing the performance and seeing that a product which fits the company's idea of a saleable item is produced. Usually the orchestra is integrated into a larger product which again must meet company standards. The television or recording company also selects the sidemen and pays them. The orchestra leader does not bear the risk of loss in the enterprise and generally does not have an interest in the profits (unless he is the featured artist on a recording). The facilities other than the instruments used, and occasionally even instruments, are furnished by the recording or television company.

After reviewing all the evidence of the relationship between the orchestra leader and the television or recording company, and principally for the above reasons, I conclude that in the television and recording fields the plaintiff Cutler is an employee. See American Broadcasting Company 134 NLRB 1458, 49 LRRM 1365 (1961). I make no finding as to big-name bands, which, as I noted earlier, are not represented among the plaintiffs.

The two practices complained of by plaintiffs with respect to which the status of the orchestra leaders as a labor group is relevant are: (1) pressuring plaintiffs into

joining the union; (2) fixing minimum leaders' fees and minimum engagement prices.

V. Pressuring of Orchestra Leaders Into Joining the Union

It is clearly permissible for a union to pressure a group of independent contractors comprising a labor group into joining the union. Los Angeles Meat Drivers v. United States, 371 U.S. 94, 103, 51 LRRM 2448 (1962). Picketing was upheld as a means of inducing independent contractors comprising a labor group to join a union in Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., supra, and an agreement foreclosing all but union jobbers from the smoked fish industry which was directed to forcing jobbers into the union was held to violate the Sherman Act in United States v. Fish Smokers Trade Council, Inc., supra, only because the jobbers were found to comprise a *non-labor* group.

In a decision relating to the AFM, United States v. AFM, 47 F.Supp. 304, 11 LRRM 596 (N.D. Ill. 1942), aff'd, 318 U.S. 741, 11 LRRM 840 (1943) (per curiam), the Supreme Court held the union's attempt to "eliminate all musical performances over the radio except those presented in person by members of the American Federation of Musicians," id. at 307, to be exempt from the Sherman Act by virtue of the Norris-LaGuardia Act. See National Labor Relations Act, 29 U.S.C., § 158(3) (1958). By limiting employment to union members, a union is, of course, coercing non-union workers to join it. Since the former is permissible, the latter certainly is.

There is no evidence in the record to indicate that the unionization of the plaintiffs was other than a matter of independent union action motivated by union self-interest. Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 811; United States v. Hutcheson, supra at 232.

In conclusion, since the plaintiffs are a labor group in the club date and hotel steady engagement fields, the defendants do not violate the antitrust laws in pressuring them into membership.

Since their expulsion from the defendant unions, Carroll and Peterson have not personally led or played at their engagements. They merely book and organize them. In this capacity they do not complete with sidemen or subleaders and the basis of the conclusion that they are a labor group falls. However, the union does not significantly hinder them from carrying on their business in this fashion. (See F.F. 12, 127.) Insofar as they do not themselves conduct or play, the charge of pressuring them into the union has not been sustained.

In the television and recording fields, the union is unquestionably free to pressure orchestra leaders like plaintiffs into membership since they are employees.

VI. Fixing Minimum Prices Charged by Leaders

The minimum prices set by the union are equal to the total minimum wages of the sidemen employed plus a leader's minimum fee. If the leader does not participate in the engagement but employs a subleader, then a prescribed portion of the leader's fee goes to the subleader. The remaining fraction of the leader's fee goes to the leader. In reciting the extra charges to be paid a leader, the union Price List booklet refers to the leader in parenthesis as a "personnel manager."

In view of the competition between leaders and sidemen and subleaders which underlies the finding that the leaders are a labor group, the union has a legitimate interest in fixing minimum fees for a participating leader and minimum engagement prices equal to the total minimum wages of the sidemen and the participating leader. Any cuts by participating leaders of their fees below union minimums

or in the price of an engagement below a union minimum equaling the total minimums of the participants puts an obvious downward pressure on the wages of subleaders and sidemen (e.g., 1122).

The legitimacy of the concern of the union in fixing the minimum prices to be charged by a group of independent contractors comprising a labor group was upheld in Local 24, International Bhd. of Teamsters v. Oliver, 358 U.S. 283, 43 LRRM 2374 (1958). The Supreme Court reversed a decision by the Ohio Supreme Court in which a collective bargaining agreement fixing the minimum rental prices of driver-owned trucks was held to constitute a violation of the Ohio antitrust law as a combination between the union and a non-labor group to fix prices. The Supreme Court held that the rental price of driver-owned trucks was a proper subject of bargaining under the National Labor Relations Act in view of the purpose of the provision to protect the wage scale of employee-drivers as well as to provide a decent income to the owner-drivers.

In Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., supra, the Supreme Court held the Sherman Act inapplicable to a union's efforts to organize a group of "vendors" who owned their own trucks and bought milk for resale to retail stores. The union's purpose was to improve the working conditions and "wages" of the vendors and to thereby protect the standards of the employee-drivers.

The question of whether the union can also provide a certain minimum compensation for "personnel managing" services to leaders who merely arrange an engagement (e.g., solicit it and organize the band) without participating in it, and insure a similar payment above the regular subleader's fee when they do participate is more difficult. Indeed, as noted earlier, Carroll and Peterson do not now personally lead at their engagements, but merely arrange them. The leader who performs the necessary functions

of soliciting and organizing engagements also negotiates the price of the engagement with the purchaser of the music. It is unquestionably true that skimping on the part of the person who sets up the engagement so that his costs are not covered is likely to have an adverse effect on the fees paid to the participating musicians. By fixing a reasonable amount over the sum of the minimum wages of the musicians participating in an engagement to cover these expenses, the union insures that "no part of the labor costs paid to a * * * [leader] would be diverted by him for overhead or other non-labor costs." Greenstein v. National Skirt & Sportswear Ass'n, Inc., 178 F.Supp. 681, 689 (S.D.N.Y. 1959).

In Greenstein v. National Skirt & Sportswear Ass'n, Inc., supra, the status of an analogous agreement between a union and manufacturers of ladies clothing to the effect that the manuafcturers pay to contractors who produce their garments an amount at least equal to the combined wages of the contractor's employees and a reasonable amount to cover overhead was in issue on a motion for preliminary injunction. The court concluded that the agreement did not violate the Sherman Act without proof that it was a result of a conspiracy to restrain trade between the employer and the union. "If these protective clauses were demanded and obtained by the union * * * as a matter of independent action in furthering the welfare of the employees they represent, then the Allen-Bradley case * * * is inapposite." Id. at 689. Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 811; United States v. Hutcheson, supra at 232.

There is no evidence in this record to indicate that the minimum price lists were sought by the union as part of a conspiracy in which the union aided "non-labor groups to create business monopolies and to control the marketing of goods and services." Allen Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 808. Nor

is there any evidence which indicates that the increment to the personnel manager is unrelated to his costs in that function. I conclude that the union's price lists do not violate the Sherman Act.

In recording and television, subleaders are apparently not used and the leader's fee would go to the actual conductor. It is perfectly permissible for the union to negotiate a minimum wage for leaders in these fields since they are employees.

The legality of the other acts charged to be violations of the antitrust laws may be considered without regard to the status of the plaintiffs as a labor group. In all of the following matters there is no evidence to indicate that the defendants acted other than independently in their own self-interest. Allen-Bradley v. Local 3, International Bhd. of Electrical Workers, supra at 811; United States v. Hutcheson, supra at 232.

VII. Refusal to Bargain

The defendant unions do not bargain collectively either with orchestra leaders or purchasers of music in the club date single engagement field. Insofar as the antitrust laws are concerned, it is not illegal for a union to refuse to bargain with an employer or a group of employers. Hunt v. Crumboch, 325 U.S. 821, 16 LRRM 808 (1945). Therefore, even assuming that the orchestra leaders are employers in the single engagement field, defendants have committed no violation of law by failing to bargain with them.

VIII. Imposing Minimum Employment Quotas

The defendants have succeeded in imposing minimum numbers of men as requirements on various types of engagements. Minimum quotas are included within the exemption from the Sherman Act afforded by the definition

of a labor dispute in the Norris-LaGuardia Act. United States v. Carrozzo, 37 F.Supp. 191 (N.D. Ill.), aff'd, 313 U.S. 539 (1941) (per curiam); United States v. AFM, supra.

IX. Requiring Orchestra Leaders To Use The Form B Contract

The language of the Form B Contract describes the orchestra leader as an employee and the purchase of the music as an employer. Its function is apparently to help establish this relationship in law. It also serves as a means of policing adherence to union scale, since the union requires that such contracts or, in the club date field, a report, be filed. The contract shows the price and terms of the engagement.

It is not clear how the use of the Form B Contract can result in a restraint of trade. In practice, the contract has failed miserably in fulfilling its primary purpose —making employees out of orchestra leaders.

The status of orchestra leaders in the club date single engagement field has been ruled on by courts on several occasions. In each instance the courts looked to all the factors which made up the employment relationship and concluded that the orchestra leaders involved there (Cutler, Carroll, Peterson) were employers. E.g., Cutler v. AFM, supra; Carroll v. Associated Musicians of Greater New York, supra; Cutler v. United States, supra. The Form B Contract was signally unpersuasive, "a self-serving subterfuge which is not entitled to any weight," according to Judge Lumbard, Cutler v. AFM, 316 F.2d at 548-49, 53 LRRM 2060. I can see no restraint of trade in the terminology in the Form B Contract referring to orchestra leaders as employees.

Nor does the requirement that the contracts be filed with the union violate the antitrust laws. The union has a

legitimate interest in knowing the terms under which its members work and does not restrain trade in gathering this information.

X. Regulating Booking Agents and Caterers

A. *Booking Agents*

The Federation instituted the licensing of booking agents and the fixing of maximum commissions at a time when the activities of booking agents were instrumental in depressing wages paid to union musicians below the union scale. Apparently, similar abuses by booking agents existed in other fields too. Edelstein v. Gillmore, 35 F.2d 723, 726 (2d Cir. 1929) (actors). The objective of the Federation was the elimination of the practices which undermined the musicians' wage structure and the regulations adopted were successful.

Booking agents are independent contractors not in job or direct wage competition with members of the defendant unions. Apparently, no court has had to decide the question of whether a group of independent contractors performing different functions than a union's members and not in competition with union members for jubs may be subjected to union regulations consistent with the antitrust laws.

In affirming the decision of the district court in Los Angeles Meat Drivers Union v. United States, supra, the Supreme Court was careful to note and repeat, id. at 103, the absence of "any actual or potential wage or job competition, *or of any other economic interrelationship,* between the grease peddlers [independent contractors] and the other members of the union." Id. at 98. On this basis it is safe to assert that economic interrelationships other than actual or potential job or wage competition will suffice to support a finding that a group of independent contractors are a labor group. Id. at 104 (Goldberg, J. concurring).

The scope of the exemption accorded to labor from the antitrust laws is determined by the definition of "labor dispute" in Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113. United States v. Hutcheson, supra. Section 13(c) provides that such a dispute "includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." A person is "participating or interested in a labor dispute" under Section 13(b) if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

This definition of a labor dispute is the source of the test of actual competition or other economic interrelationship between independent contractors and union members for determining whether the former is a labor group that the union may regulate. Los Angeles Meat Drivers v. United States, supra; Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., supra. Although job and wage competition may be the most common indicia of a labor dispute involving independent contractors, there is no reason why such competition should be the only criterion satisfying the Norris-LaGuardia definition.

Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are justified in regulating their activities without contravening the Sherman Act. Furthermore, I find the regulations to be reasonably related to their

interest in maintaining observance of union scale wages and working conditions.

B. *Caterers*

Caterers, also independent contractors not in job or wage competition with union members, are in a unique position to affect the choice of orchestras by purchasers of music and the wages and working conditions of musicians. They have frequent contact with purchasers of music, control places where musicians perform and are relied on to arrange many aspects of the functions at which musicians perform.

The evidence discloses that caterers took advantage of their position before the union adopted its regulations to, in effect, book orchestras and they continue to do so, at least to some extent. Caterers recommend orchestras to customers and receive commissions from orchestra leaders. These practices actually or potentially affect the wages of the musicians involved.

I believe that this constitutes an economic interrelationship which permits the defendants to regulate and prohibit the booking activities of the caterers without violating the Sherman Act.

XI. Restrictions on Traveling Orchestras

Various AFM regulations favor the employment of local musicians rather than musicians from outside the jurisdiction. The principal incentive to employ local musicians is a requirement that "foreign" musicians be paid higher wages.

Local employment and working conditions have long been recognized as legitimate concerns of labor unions. See American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921). In the face of antitrust attack, courts have repeatedly sustained union regu-

lations requiring a foreign employer to adhere to the shorter workday and the higher wage scale of the standards prevailing in his home local or the local where the work was to be performed and to hire a specified percentage of his men from the latter local. Rambusch Decorating Co. v. Brotherhood of Painters, 105 F.2d 134, 4 LRRM 543 (2d Cir. 1939), cert. denied, 308 U.S. 587, 5 LRRM 693 (1939); Barker Painting Co. v. Brotherhood of Painters, 23 F.2d 743 (D.C. Cir. 1927), cert. denied, 276 U.S. 631 (1928); Barker Painting Co. v. Brotherhood of Painters, 15 F.2d 16 (3rd Cir. 1926), cert. denied, 273 U.S. 748 (1927).

The Second Circuit noted in Rambusch, supra at 138:

"* * * Of course, the real point here relied on is the supposed discrimination between non-resident and resident contractors. Discrimination of this general kind is one of the most natural things in the world, applied by states and cities in civil service appointments; by courts in cost bonds and other burdens against non-residents; by merchants, customers, laborers, and servants in trusting and favoring the local man with whom they have long dealt and expect to deal in the future. * * *"

I find no antitrust violation in the regulations here protecting local employment opportunities.

XII. Monopolization

Plaintiffs' claim that the defendant unions are attempting to or have monopolized the music industry boil down to the fact that the defendants are enforcing a closed shop. It is clear that this violates no antitrust law. United States v. AFM, supra; Courant v. International Photographers of Motion Picture Industry, 176 F.2d 1000, 24 LRRM 2510 (9th Cir. 1949), cert. denied, 338 U.S. 943, 25 LRRM 2265 (1950); Kolb v. Pacific Maritime Ass'n, 141 F.Supp. 264 (N.D. Cal. 1956).

In conclusion I find that defendants have violated no antitrust law. The complaints also allege the existence of

a common-law restraint of trade. I find this charge to be equally without substance.

Although the defendants have successfully defended this suit, they are not entitled to attorneys' fees. 15 U.S.C. § 15; Talon, Inc. v. Union Slide Fastener, Inc., 266 F.2d 731, 739-40 (2d Cir. 1959); Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888, 899-900 (S.D.N.Y. 1948).

Conclusions of Law

1. The defendant unions are labor organizations within the meaning of the Norris-LaGuardia Act, 29 U.S.C. §§ 101-113; the National Labor Relations Act, 29 U.S.C. § 151 et seq.; and the Clayton Antitrust Act, § 6, 29 U.S.C. § 17.

2. Defendants' motion to strike certain evidence, on which decision was reserved, is denied.

3. Plaintiffs Turecamo and Terry are no longer parties to this action.

4. Plaintiff Orchestra Leaders of Greater New York is not a proper party plaintiff and lacks standing to sue in this action.

5. The plaintiffs have failed to establish their claim to represent other orchestra leaders. Only the parties to the action will be affected by the decree.

6. There is job and wage competition and other economic interrelationships, significantly affecting defendants' legitimate union interests between plaintiffs in the club date single and hotel steady engagement fields and other employee-members of defendant unions who perform services as subleaders and sidemen in the club date and hotel steady engagement fields.

7. The plaintiffs are employees of the recording companies and television broadcasters when they perform services for them.

8. The plaintiffs constitute a "labor" group.

9. The defendant unions may legally pressure the plaintiffs into becoming members.

10. None of the defendants' regulations and practices complained of by plaintiffs constitute a violation of the federal antitrust laws (15 U.S.C. §§ 1 et seq.) or a common-law restraint of trade. They all come within the definition of the term "labor dispute" in the Norris-LaGuardia Act, 29 U.S.C. § 113, and are exempt from the antitrust laws.

11. The complaints in these actions should be dismissed and judgments entered for defendants, with costs to defendants.

Judgment

(TITLE)

The issues in the above-entitled actions having been regularly brought on for trial before Hon. Richard H. Levet, without a jury, the parties having appeared by their respective counsel, and the issues having been duly tried; and the Court having filed its Opinion and Findings of Fact and Conclusions of Law on May 18, 1965 directing judgment as herein provided; it is

ORDERED, ADJUDGED AND DECREED that the above entitled actions be and they hereby are dismissed on their merits, and that defendants recover from plaintiffs the costs in these actions.

RICHARD H. LEVET
U. S. D. J.

New York, N. Y.
May 24, 1965

Judgment Entered 5/25/65
JAMES E. VALACHE
Clerk

June 25th 1965
Costs taxed in the sum of $3523.78 and added to the judgment.

JAMES E. VALACHE
Clerk

Notice of Appeal

(TITLE)

60 Civil 2939

PLEASE TAKE NOTICE that plaintiffs appeal to the United States Court of Appeals for the Second Circuit from (a) judgment herein of the United States District Court, signed by United States District Judge, Richard H. Levet, on May 24, 1965, and entered on the docket in the office of the Clerk of this Court on the 25th day of May, 1965, and (b) said Court's "OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW" (OPINION No. 31232) dated May 17, 1965, and filed May 18, 1965, insofar (i) such judgment dismisses the above entitled actions and complaints on their merits; (ii) said judgment awards defendants costs against plaintiffs; and (iii) said District Court's "FINDINGS OF FACT AND CONCLUSIONS OF LAW" differ from the PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW presented by plaintiffs to the said District Court for the Southern District of New York (copies of such PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW as submitted by plaintiffs having been first duly served upon attorneys for defendants herein).

Dated: New York, N. Y.
May 27, 1965

Godfrey P. Schmidt
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MU 7-1950

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75 and 76

September Term, 1966

(Argued November 28, 1966

Decided January 30, 1967)

Docket Nos. 30445 and 30446

JOSEPH CARROLL, CHARLES PETERSON and CHARLES TURECAMO, as Treasurer, Orchestra Leaders of Greater New York,

Plaintiffs-Appellants

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, HERMAN D. KENIN, as President of said Federation, STANLEY BALLARD, as Secretary of said Federation, and GEORGE V. CLANCY, as Treasurer of said Federation, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, and AL MANUTI, as President of Local 802, MAX L. ARONS, as Secretary of Local 802 and HI JAFFE, as Treasurer of Local 802,

Defendants-Appellees

Before FRIENDLY, SMITH and ANDERSON, Circuit Judges.

Appeal from a judgment dismissing the two complaints in a consolidated class action, charging the defendants with violations of the anti-trust laws, in the United States District Court for the Southern District of New York, Richard H. Levet, J. Affirmed except as to determination of issue of price-fixing on which the judgment is reversed and remanded.

Godfrey P. Schmidt, Esq., New York City New York, for Plaintiffs-Appellants

Emanuel Dannett, Esq., New York City, New York (McGoldrick, Dannett, Horo-

witz & Golub, Attorneys for Appellees American Federation of Musicians of the United States and Canada, Herman D. Kenin, Stanley Ballard and George V. Clancy; Ashe & Rifkin, Attorneys for Appellees Associated Musicians of Greater New York, Local 802, Al Manuti, Max Arons and Hy Jaffe; Henry Kaiser, Esq., Jerome H. Adler, Esq., David I. Ashe, Esq., George Kaufmann, Esq., and Eugene Mittelman, Esq., on the brief) for Defendants-Appellees

ANDERSON, Circuit Judge:

Plaintiffs-appellants are orchestra leaders, who in a series of suits over the past several years, have challenged the legality of numerous activities and regulations of the appellees.[1] The present actions instituted by appellants, Peterson and Carroll, in which Ben Cutler and Marty Levitt were allowed to intervene, as claimed class actions on behalf of themselves and as representatives of other orchestra leaders, charged the American Federation of Musicians and its New York affiliate, Associated Musicians of Greater New York, Local 802, with nine separate violations of the anti-

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[1] Carroll v. Associated Musicians, 206 F. Supp. 462 (S.D.N.Y. 1962) affirmed, 316 F.2d 574 (2 Cir. 1963); Cutler v. American Federation of Musicians, 211 F. Supp. 433 (S.D.N.Y. 1962), 316 F.2d 546 (2 Cir.), cert. denied 375 U.S. 941 (1963). By stipulation, the testimony in those actions is made a part of the record in this action.

Appellants' motions for preliminary injunctions were passed upon on appeal by this court in Carroll v. Associated Musicians, 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960); Carroll v. American Federation of Musicians, 295 F.2d 484(2 Cir. 1961); and Carroll v. American Federation of Musicians, 310 F.2d 325 (2 Cir. 1962).

trust laws, none of which is protected by either the Clayton Act[2] or the Norris-La Guardia Act.[3]

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[2] Section 6 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1959) provides:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purpose of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20, of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1959) provides:

> "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which there is no adequate remedy at law . . . And no such restraining order or injunction shall prohibit any person or persons [from striking, assembling, organizing, etc.] . . ."

[3] Section 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 104 (1959), provides:

> "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from doing, whether singly or in concert, any of the following acts:
>
> [striking, joining a labor union, giving strike benefits, lawfully aiding in a labor dispute, publicizing a dispute, assembling, etc.]"
>
> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the associa-

The first complaint was filed in July 1960 and the other, brought to include a challenge to an increase in the musicians' wage scale adopted after the July suit was started, was filed in December, 1960. Both actions sought preliminary and permanent injunctive relief, as well as treble damages for alleged injuries. The district court, sitting without a jury, after a trial of five weeks, dismissed the complaints and entered judgment for the defendants. *Carroll* v. *American Federation of Musicians,* 241 F. Supp. 865 (S.D.N.Y. 1965). The appeal to this court presents the question of whether various practices of the unions violate the Sherman Act.[4]

The American Federation of Musicians, an affiliate of the AFL-CIO, consists of 683 local unions and has a membership of more than 260,000. Almost all of the musicians in the United States, referred to in the trade as sidemen, and most of the orchestra leaders and sub-leaders, who act as substitute orchestra leaders, are members of the Federation or its locals. Local 802, with 30,000 members, has virtual

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tion or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Norris-LaGuardia Act § 13, 47 Stat. 73 (1932), 29 U.S.C. § 113(c) 1959.

[4] 26 Stat. 209 et seq. (1890), 15 U.S.C. §§ 1 and 2 (1959):

Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

control of labor in the music industry in the New York area. The appellants were members of Local 802 when this action was brought, but Carroll and Peterson have been expelled from membership since that date.

Essential to an understanding of the issues presented is a definition of terms and a description of the practices which distinguish the industry.

Musical engagements are generally classified as either "steady", those lasting for longer than one week, or "single", usually one day or one performance affairs but including all engagements lasting less than one week. The much sought after steady engagements are rare in comparison with the number of single engagements.

The predominant form of single engagement is the "club date", such as weddings, parties and dances, which provides employment for the largest number of musicians. Single engagements also include the "non-club date" field consisting of television appearances or recording engagements, etc. The distinction between the kinds of single engagements is vital; the non-club date engagements are ordinarily governed by collective bargaining agreements concluded by the union and the "purchaser" of music. The same is usually true of the steady engagement field. Local 802 has collective bargaining agreements with the major users or "purchasers" of live music within its area such as recording companies, hotels, television and film producers, opera companies and theatres. These agreements treat the "purchaser" as the employer and the orchestra leader as its employee, little different from a sideman. Indeed, in this field such a characterization would ordinarily be justified, because in the recording industry, for example, in which all engagements are goverened by such collective bargaining agreements, a regular employee of the recording company exercises general supervision over the orchestras hired. He selects the orchestra leader, who does the conducting and some arranging, hires the sidemen and determines their

number, their instruments and the compositions to be played and exercises general control over the orchestra's performance. The recording company pays each musician, as well as the orchestra leader, individually and is responsible for the withholding of social security, federal and state taxes, as well as all bookkeeping. The practices are similar in most engagements covered by the union's collective bargaining agreements.

The club date field is entirely different in that it is not governed by collective bargaining agreements. Rather, the orchestra leader secures the engagement, either by himself or through booking agents, and negotiates directly with the music purchaser, usually for a flat price, and the responsibility for collecting the fee, paying the sidemen, withholding taxes and keeping records is his. His remuneration is the difference between his costs, primarily the wages of sidemen, and the amount received from the music purchaser. The district court assumed, without explicitly finding, that orchestra leaders are employers or independent contractors when operating in this field. In light of the fact that an orchestra leader working a club date is no different from any other independent contractor, who employs his own laborers, we concluded, as we have in other contexts in this litigation, see, *e.g.*, *Cutler* v. *Amercian Federation of Musicians*, 316 F.2d 546, 549 (2 Cir. 1963), affirming 211 F. Supp. 433, 445 (S.D.N.Y. 1962); *Carroll* v. *American Federation of Musicians*, 295 F.2d 484, 486 (2 Cir. 1961); *Carroll* v. *Associated Musicians*, 284 F.2d 91 (2 Cir. 1960), affirming 183 F. Supp. 636 (S.D.N.Y. 1960), that orchestra leaders are employers in the club date field.

It should not be inferred, however, that orchestra leaders are a homogeneous class. Some of them only act as orchestra leaders, a few of whom employ more than one orchestra at a time. When the leader is not with his orchestra, he employs a sub-leader as his substitute. Others work only part-time in this capacity, accepting whatever engagements they can find, and work as sidemen or sub-leaders the rest of the

time. Still others work as orchestra leaders part-time and are regularly employed outside of the music industry. While the majority of leaders' engagements are in the club date field, they also seek engagements outside of it, either in the single or steady date field. Obviously there is a great deal of fluidity in the industry. Very few orchestra leaders employ their own orchestras full-time. The normal practice is for an orchestra leader first to secure an engagement, determine how many sidemen will be needed, and then employ them through the union hiring hall.

Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions, because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the union. The licensing agreements limit the commissions of booking agents to 10% for steady engagements and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale. In the past, engagements were also secured through the owners of catering halls and their employees, for which the caterer received a commission. Present union by-laws forbid this practice.

The Federation exercises rigid and monolithic control over much of the music industry, and this is especially true of Local 802 in the New York area. Within the jurisdiction of the Local, the closed shop is enforced by numerous by-laws, and pressure is placed upon orchestra leaders in various ways to induce them to become union members. For example, union members are not permitted to work in an orchestra in which a non-member leader either conducts or plays or which bears the name of a non-member.[5] A non-union orchestra leader may thus operate only if he hires

[5] Article IV, § 1(h) of the Local 802's by-laws.

sub-leaders to conduct. This is the situation of both Carroll and Peterson since their expulsion from the union. There are further restrictions which prevent union members from playing for proscribed or "unfair" persons, for instance an orchestra leader who has employed non-union musicians.

Having achieved a virtual closed shop, Local 802 regulates the club date field in great detail. Under its by-laws, member orchestra leaders are required to follow the "Price List Booklet", which is actually a codification of the standing resolutions of Local 802's Executive Board, and it governs all musical engagements not subject to any of the local's outstanding collective bargaining agreements. The booklet characterizes orchestra leaders as employees—"personnel managers"—and refers to the purchaser of music as the employer. It contains resolutions which establish the minimum number of sidemen required and the wage scales for the sidemen and sub-leaders in all engagements covered by it, providing with considerable specificity for variations according to the number of performances, the nature and length of the engagement, the establishment where it is played, and similar details.

The price list also sets a minimum for all covered engagements under the title 'Regulations for Establishing Leaders' Fees in Single Engagements." These regulations, in fact, establish price floors because the orchestra leader is required to charge the music purchaser not less than the total of his "leader's fee", the sidemen's wages and other fees.[6] The leader's fee is a specific percentage above the union wage scale, graduated according to the number of musicians performing. Price floors are set for both single and steady engagements.

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[6] The other required charges include an 8% addition, equivalent to social security costs, minimum charges for the carting of instruments and mileage fees for traved to the engagement and the standard 10% surcharge for traveling engagements.

As indicated above, the price list is established unilaterally by Local 802. Under its by-laws the Executive Board is authorized to adopt resolutions establishing wages and prices, except where a meeting of the general membership votes on such price list resolutions. Once promulgated, the members must comply with such resolutions. There is no collective bargaining with orchestra leaders concerning the wage scales, price restrictions or other regulations established in the price list. Nor is there any collective bargaining with purchasers of music except, as discussed earlier, in the case of large-scale users of music who have standing agreements with Local 802 or with the Federation. Thus, in the club date field, which comprises most of the single engagements, and in many of the steady engagements, terms and conditions of employment, including wages, and minimum prices for orchestral engagments are determined by unilateral action of the union.

Enforcement of the regulations promulgated by the Executive Board is achieved by requiring orchestra leaders to report to Local 802 and by insistence upon the use of the Federation's "Form B" contract. This contract form, characterizing orchestra leaders as employees, was adopted by the Federation in 1941, and is the only engagement contract which a member is permitted to sign. The by-laws also provide that such contracts must be submitted for approval to the local union before the performance. Local 802, however, has relaxed these rules for single engagements by accepting an assurance either by telephone, by letter or by a report in person that the agreement with the purchaser complies with all union regulations and provides for payment of the sidemen according to the union wage scale. It insists, in addition, that all engagements as orchestra leaders first be approved by the Executive Board. In order further to assure compliance with the Price List, Local 802 employs "business representatives" who attend engagements to make certain that all regulations are being obeyed.

In order to protect the job market for local musicians against the encroachments of musicians and orchestra leaders who do not normally operate in the area, the Federation has instituted additional regulations for traveling engagements, which are those played by orchestras and members outside of the jurisdiction of their respective local unions. Formerly such engagements were sought to be curtailed by a 10% traveling surcharge which orchestra leaders were required to pay to the Federation.

After this court held that the tax violated § 302 of the Taft-Hartley Act, *Cutler* v. *American Federation of Musicians*, 316 F.2d 546 (2 Cir.) cert. denied 375 U.S. 941 (1963), the Federation adopted a price differential plan. The new by-laws require a traveling orchestra to charge, for steady engagements, 10% more than the minimum fee for a local orchestra and, for single engagements, 10% more than the minimum price of either its home local or of the local in whose territory it is playing, which ever is greater. Orchestra leaders performing steady traveling engagments are barred from accepting any single engagements anywhere until after the steady engagement has been completed; and at the termination of the initial engagement, they are also barred from accepting a succeeding steady engagement in the invaded territory.

In addition to inhibiting traveling orchestras, the Federation also discourges the travel of its members by various restrictions on the importing of musicians by a local orchestra leader. Although musicians are privileged as a matter of right to transfer their membership from one local to another, provided that they do not compete for jobs in the new area for three months after their transfer, the emphasis of the Federation's regulations is strongly placed upon maintaining a protected job market for the members of each local and thereby assuring the strength of the Federation's local unions.

The appellants, who claim to be representative of a class of orchestra leaders, contend that the foregoing practices and regulations of the Federation and of Local 802 violate the Sherman Act in the following respects:

(a) they fix the minimum prices which may be charged for orchestral engagements;

(b) they require that orchestral engagements be played by the minimum number of sidemen which the union establishes;

(c) they impose territorial restrictions on the operations of orchestra leaders and sidemen;

(d) they establish a monopoly in the music industry;

(e) they require all employees to use, for orchestral engagements, a written form of contract provided by the union;

(f) they refuse to bargain with orchestra leader-employers about the terms and conditions of employment;

(g) they coerce orchestra leaders into becoming members of the uninon;

(h) they regulate the activities of booking agents with whom the orchestra leaders must deal; and

(i) they deny orchestra leaders the opportunity to accept engagements from caterers.

A threshold question is whether appellants do in fact represent a class under Rule 23(a), Fed. R. Civ. P., as well as themselves as individuals. Their claim is that they adequately represent the interests of the class of persons within the jurisdiction of Local 802 who devote all or almost all of their time to being orchestra leaders and, as such operate primarily in the club date field. The district judge ruled that the action could not be maintained as a true class action

under Rule 23(a)(1)[7], and we are in accord with the decision on that issue.

In a true class action, all of the members of the class, including those absent, are bound by the judgment. See *Supreme Tribe of Ben Hur* v. *Cauble,* 255 U.S. 356 (1921); *Dickinson* v. *Burnham,* 197 F.2d 973 (2 Cir.), cert. denied 344 U.S. 875 (1952); *Giordano* v. *Radio Corporation of America,* 183 F.2d 558 (3 Cir. 1950). Therefore the interests of the affected persons must be carefully scrutinized to assure due process of law for the absent members. See *Hansberry* v. *Lee,* 311 U.S. 32 (1940). Since all members of the class are to be bound by the judgment, diverse and potentially conflicting interests within the class are incompatable with the maintenance of a true class action.

A spurious class action under Rule 23(a)(3), however, does not bindingly adjudicate the rights of members of the class who do not come before the court. *Nagler* v. *Admiral Corp.,* 248 F.2d 319, 327 (2 Cir. 1957); *Dickinson* v. *Burnham, supra* at 979; *California Apparel Creaters* v. *Wieder,* 162 F.2d 893, 896-897 (2 Cir.), cert. denied, 332 U.S. 816 (1947); *York* v. *Guaranty Trust Co.,* 143 F.2d 503, 529 (2 Cir. 1944), reversed on other grounds, 326 U.S. 99 (1945).

Although Rule 23(a) requires that the parties suing on behalf of the class insure the adequate representation of all

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[7] Rule 23(a), Fed. R. Civ. P. in pertinent part provides:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

* * * * *

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

members of the class without distinguishing between true and spurious class actions, the res judicata distinction between the two is vital. A much stricter standard for determining the adequacy of representation should obtain where there are non-intervenors who would be bound by the judgment. See *Oppenheimer* v. *F. J. Young & Co.*, 144 F.2d 387, 390 (2 Cir. 1944); Cf. *York* v. *Guaranty Trust Co., supra* at 528, n. 52 ("As the suit comes within Rule 23(a)(3), so that a judgment will not be res judicata as to . . . [non-intervenors], there is no necessity for a searching inquiry concerning the adequacy of her representation of others in the class.")

It is apparent that the present case does not qualify as a true class action under Rule 23(a)(1). It was brought by orchestra leaders as a direct challenge to the unions' control in the music industry, but there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies; and there was no evidence offered by the appellants that such a group did not exist. Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements. Similar economic benefits to orchestra leaders are inherent in other of the union's regulations, for example, the restrictions on traveling engagements. Thus appellants' representation cannot be said fairly to insure that the interests of these absent orchestra leaders will be protected. *Hansberry* v. *Lee, supra*, Cf. *Giordano* v. *Radio Corporation of America, supra* at 560. Consequently the judgment in this action can bind only the named defendants and the four individual plaintiffs before the court.

We are in agreement with the district court's conclusion that the question of whether the representation of appellants is adequate to support a spurious class action should

not be answered at this time. Such an action is actually no more than a permissive joinder device. *York* v. *Guaranty Trust Co., supra; California Apparel Creators* v. *Wieder, supra; Nagler* v. *Admiral Corp., supra.* "It stands as an invitation to others affected to join in the battle and an admonition to the court to proceed with proper circumspection in creating a precedent which may actually affect non-parties, even if not legally *res judicata* as to them. Beyond this, as we in common with other courts have pointed out, it cannot make the case of the claimed representatives stronger, or give them rights they would not have of their own strength, or affect legally the rights or obligations of those who do not intervene." (Footnote omitted). *All-American Airways* v. *Elderd,* 209 F.2d 247, 248 (2 Cir. 1954). 3 Moore, Federal Practice ¶ 23.10 (1) (3). At the present time, nobody is attempting to intervene; until somebody does, it is not necessary to decide that issue.

Application of the Sherman Act to the activities of labor unions involves a balancing of conflicting Congressional policies. Many of the devices which labor unions are permitted to use to further the interests of workers are similar to those forbidden to businessmen by the anti-trust laws. It is, of course, settled that "labor unions are to some extent and in some circumstances subject to the [Sherman] Act . . ." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 489 (1940). The history of the use of the anti-trust laws against labor unions and the resulting legislation passed by Congress make it clear that the Sherman Act's area of application in labor cases is now restricted to certain narrowly defined practices; the Norris-LaGuardia Act takes all "labor disputes", as therein defined, outside of the reach of the Sherman Act.[8]

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[8] Although the statute is cast in terms of the federal courts' jurisdiction to grant injunctive relief, it also applies to criminal prosecutions under the anti-trust laws, United States v. Hutcheson, 312 U.S. 219, 234-235 (1941), and cases at law.

Appellants contend that this case comes within the rule of *Allen Bradley Co.* v. *Local 3,* 325 U.S. 797 (1945), which creates an exception to the immunity afforded the unions for those cases in which a labor union combines with businessmen to achieve a commercial restraint. See also *United States* v. *Employing Plasterers' Association,* 347 U.S. 186 (1954); *United Brotherhood of Carpenters and Joiners* v. *United States,* 330 U.S. 395 (1947); *United States* v. *Hutcheson,* 312 U.S. 219 (1941) (dictum). Cf. *Hunt* v. *Crumboch,* 325 U.S. 821 (1945), decided the same day as *Allen Bradley Co.* (holding a union exempt because there was no conspiracy with a business group); *Cedar Crest Hats, Inc.* v. *United Hatters Union,* 362 F.2d 322 (5 Cir. 1966); *Greenstein* v. *National Skirt and Sportswear Association, Inc.,* 178 F. Supp. 681 (S.D.N.Y. 1959), appeal dismissed 274 F.2d 430 (2 Cir. 1960). Under the appellants' view of this case, there is a conspiracy by the unions with "non-labor" groups to engage in practices which are unlawful, because they are in restraint of trade. But the facts do not support such a conclusion.

Allen Bradley Co. was a case involving a conspiracy between business men and a labor union to prevent goods produced out side of the New York area from being sold within that area. The purpose of this compact was to create a local business monopoly. For a union's activity to fall outside of the protection of the definition of a "labor dispute" in § 13 of the Norris-LaGuardia Act (see footnote 3, supra), it must be shown that there was a conspiracy with a "non-labor group". That principle was reaffirmed by the opinion of the Court in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965). Three members of the Court in a separate concurring opinion concluded that the trier could infer such a conspiracy from the fact of an industry-wide collective bargaining agreement which tended to achieve an unlawful restraint. See the concurring opinion 381 U.S. at 673. In *Pennington,* the claim was that the United Mine Workers had "entered into a conspiracy with the large [coal mine]

operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and preempting the market for the large, unionized operators." 381 U.S. at 664. It was for that reason that the union's wage agreement was not exempted from the anti-trust laws.

In the present case there is no evidence of a conspiracy between Local 802, or the Federation, and orchestra leaders to eliminate competitors, fix prices or achieve any other commercial restraint, nor was such a finding made by the district judge. Rather, the record establishes that all restraints were instituted unilaterally by the unions and acquiesced in by the orchestra leaders. Nor does the fact that the unions reached agreements with non-labor groups—booking agents, recording companies and others—place this case within the exception.

Nevertheless, there is a narrower ground upon which the legality of the unions' activities must be tested. If the unions coerced orchestra leaders with regard to a matter which is not a "term or condition of employment", they would not be exempt from the provisions of the Sherman Act, because the Norris-LaGuardia Act affords immunity from the impact of the anti-trust laws only for "labor disputes"; it does not provide a blanket exemption.

This rule is readily apparent from the Supreme Court's disposition of *Local Union No. 189* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), decided the same day as *Pennington*. In that case, the Meatcutters' and Butchers' Union sought to prevent any store in the Chicago area from selling meat except during the hours of 9:00 A.M. to 6:00 P.M. All members of a bargaining association of stores acceded to the union's demand except Jewel Tea Co. which held out. The union called a strike against it which thereby forced Jewel

Tea to acquiesce. On Jewel Tea's suit to void this condition in its contract with the union, the district court held that there was no evidence of a conspiracy between the union and the retailers' association to impose the restricted marketing hours on the company. The case thus came to the Supreme Court "stripped of any claim of a union-employer conspiracy against Jewel." 381 U.S. at 688. Mr. Justice White, announcing the decision of the Court, said that the marketing hours restriction would not have been immune if it had not been a mandatory subject of collective bargaining, which the Court held that it was. In a concurring opinion, Mr. Justice Goldberg, writing for himself and two other members of the Court, was in essential agreement with this position, but took issue with what he thought was Mr. Justice White's "narrow, confining view of what labor unions have a legitimate interest in preserving and thus bargaining about." 381 U.S. at 727. He conceded, however, that the "direct and overriding interest of unions in such subjects as wages, hours and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly lacking where the subject of the agreement is price-fixing and market allocation." 381 U.S. at 732-733.

These statements are applicable as well to the present case. Here, of course, since the unions do not bargain with orchestra leaders or with music purchasers in the club date field, the union's protective provisions do not, as in *Jewel Tea,* appear in agreements with employers. They are, instead, unilaterally adopted by the unions and complied with by the orchestra leaders because of the threats of retaliation present in the unions' by-laws. The policy considerations are, however, the same.

"[E]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local Union No. 189* v. *Jewel Tea Co., supra,* at 689 (White, J.). Thus, in the absence of an illegal conspiracy, mandatory subjects of

collective bargaining carry with them an exemption; the national labor policy demands that the parties be permitted freely to reach agreement on terms and conditions directly affecting the working man. *See Local 24* v. *Oliver*, 358 U.S. 283 (1959). Cf. *United States* v. *Amercian Federation of Musicians*, 47 F. Supp. 304 (N.D. Ill. 1942) aff'd per curiam 318 U.S. 741 (1943); *United States* v. *Carrozzo*, 37 F. Supp. 191 (N.D. Ill. 1941), aff'd per curiam sub nom. *United States* v. *International Hod Carriers*, 313 U.S. 539 (1941); *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91, 98-99 (1940). Indeed, neither management nor labor could refuse to bargain about such subjects. National Labor Relations Act §§ 8(a)(5), (b)(3), (d), 49 Stat. 452 (1935), as amended 29 U.S.C. §§ 158(a)(5), (b)(3), (d) (1959). On matters outside of the mandatory area, however, no such considerations govern because the national labor policy does not require management and labor to bargain about them.

In light of the foregoing, we conclude that the unions' establishment of price floors on orchestral engagements constitutes a per se violation of the Sherman Act. The price of orchestral engagements is not a subject of such direct and overriding interest to the unions, as representatives of sidemen and sub-leaders, that it is a mandatory subject of collective bargaining; and the unions' representation of orchestra leaders, whom this court has held to be employers in the field under consideration, cannot serve as a basis for its establishhment of uniform price floors. See *Los Angeles Meat & Provisions Drivers Union* v. *United States*, 371 U.S. 94 (1962); *United States* v. *Women's Sportswear Manufacturers' Association*, 336 U.S. 460 (1949); *Columbia River Packers Association, Inc.* v. *Hinton*, 315 U.S. 143 (1942); *Local 36* v. *United States*, 177 F.2d 320 (9 Cir. 1949).

The arguments that musicians are interested in the prices charged by their employers, because they form the boundary of the wages they can expect to receive is not

persuasive because it would justify an invasion of the proper function of management, which, with few exceptions, would go beyond any balancing of the labor and antitrust laws and effect the complete paralyzation of the latter. See *Hawaiian Tuna Packers, Ltd.* v. *International Longshoremen's Union*, 72 F. Supp. 562 (D. Haw. 1947). The same principle would support union-instigated price-fixing in any industry.

Appellees also argue, in justification, that historically many orchestra leaders have been financially irresponsible, and the only way to assure that sidemen will be paid is to make certain that orchestra leaders have profits. But, while the history of an industry has a bearing upon whether a subject is of direct interest to labor unions, see *Greenstein* v. *National Skirt & Sportswear Ass'n supra;* cf. *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964), such assurances that leaders will pay their sidemen can be achieved by means much less drastic than price fixing.

To be distinguished from the present action are cases like *Local 24* v. *Oliver, supra.* There the union was permitted to compel a carrier to pay certain wages to its employees and also to pay a profitable rental to owners-drivers, who were independent contractors performing the same function as union members. The prices received by the owner-drivers were a term or condition of employment of the union members, because "an inadequate rental might mean the progressive curtailment of jobs through the withdrawal of more and more carrier owned vehicles from service." 358 U.S. at 293-94. Cf. *Milk Wagon Drivers' Union* v. *Lake Valley Products, Inc., supra.* Here, the attempt to establish price minima, when orchestra leaders do not actually perform with their orchestras cannot be justified on the ground that there is job or wage competition or any other economic interrlationship between them and other employees represented by the unions. See *Los Angeles Meat and Provisions Dirvers Union* v. *United States,*

supra at 103. The establishment of price floors by union fiat may seem to be a different matter, however, when the orchestra leader actually performs with his orchestra. In that situation the services of a sub-leader would not be required and the leader may in this way save the wages he would otherwise have to pay. Consequently, he could make the services of his orchestra available at a lower price than could a non-performing leader.

The cases make it clear, however, that price-fixing generally is not only not a mandatory subject for collective bargaining but is one toward which union activity may not be directed without violating the anti-trust laws. The unions assert that in this case the price-fixing is essential to the mandatory subject of job protection, as it was in *Local 24* v. *Oliver, supra;* but in that case the union members were faced with the probability that, if a particular minimum price were not charged as rent by the owner operators of the vehicles, the employee-drivers, who were members of the union, would have to accept substandard wages or see their jobs entirely "contracted out" by the employer.[9] The circumstances constituting a possible threat to the employment of sub-leaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of "contracting out." See *Fibreboard Paper Products*

[9] A labor union may insist, of course, that employers "contract out" no work which is otherwise performed by union members. *N.L.R.B.* v. *Adams Dairy, Inc.*, 379 U.S. 646 (1965), reversing 322 F.2d 553 (8 Cir. 1963); Fibreboard Paper Products Corp. v. N.L.R.B., supra; Town & Country Manufacturing Co. v. N.L.R.B., 316 F.2d 846 (5 Cir. 1963), enforcing 136 NLRB 1022 (1962).

Corp. v. *N. L. R. B., supra* at pp. 220-225 (Stewart, J. Concurring.)

Issues quite different in nature from price-fixing are raised by the appellants concerning travel restrictions and employment quotas, because both are mandatory subjects of collective bargaining and reflect union interest in maintaining the job market. See *United States* v. *American Federation of Musicians, supra; United States* v. *Carrozzo, supra.* Cf. *Fibreboard Paper Products Corp.* v. *N.L.R.B. supra.* Moreover, local unions have a direct interest in protecting the job market for their workers, cf. *Rambusch Decorating Co.* v. *Brotherhood of Painters,* 105 F.2d 134 (2 Cir.), cert. denied 308 U.S. 587 (1939), so that a music purchaser, for example a recording company, cannot refuse to bargain on a union's demand that only musician-employees who belong to the local union be employed. Cf. *N.L.R.B.* v. *Bradley Washfountain Co.,* 192 F.2d 144, 154 (7 Cir. 1951); *N.L.R.B.* v. *Andrew Jergens Co.,* 175 F.2d 130, 134 (9 Cir.), cert. denied 338 U.S. 827 (1949) (Union shop held mandatory subject of collective bargaining.) In the present case, since the employers do not remain within the jurisdiction of any local when they are traveling, the only realistic way to achieve local security is through the enforcement of restrictions by the national union. See *Rambusch Decorating Co.* v. *Brotherhood of Painters, supra.* As neither the travel restrictions nor the employment quotas were instituted in furtherance of a conspiracy with a non-labor individual or group, they are immune under the Norris-LaGuardia Act.

Appellants' contention that the Federation is an unlawful monopoly involves the claim that its achievement of a closed shop violates the Sherman Act. A closed shop dispute, however, concerns a "term or condition of employment", and therefore is exempt. See *United States* v. *American Federation of Musicians, supra.* Cf. *N.L.R.B.* v. *Bradley Washfountain Co., supra; N.L.R.B.* v. *Andrew Jergens Co., supra.* As a union's pursuit of a closed shop is pro-

tected, the accomplishment of its objective cannot be declared to be a violation of the Sherman Act. See *Kolb* v. *Pacific Maritime Ass'n*, 141 F. Supp. 264 (N.D. Cal. 1956). See generally *Apex Hosiery Co.* v. *Leader, supra; United States* v. *Gold*, 115 F.2d 236 (2 Cir. 1940). Rather, the elimination of price competition based upon inequality of labor standards is a legitimate and recognized objective of any national labor organization. See *United Mine Workers* v. *Pennington, supra* at 666; *Apex Hosiery Co.* v. *Leader, supra* at 503; Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254-255 (1955).

The appellants also contend that the unions merely by requiring orchestra leaders to use their Form B contract violate the anti-trust laws. This contract serves primarily as a reporting device which enables them to insure against violations of wages scales and other regulations. The use of such a standardized contract, without more, does not under ordinary circumstances constitute an unreasonable restraint of trade; if there are specific provisions in it which do, the complaint should so allege. Of course, the contract form provided for the club date field must, consistently with this decision, omit any provision which would, in effect, constitute price-fixing.

The charges concerning the unions' refusal to bargain with orchestra leaders and their activities in putting pressure on them to become union members constitute allegations of prima facie violations of the National Labor Relations Act. See Labor Management Relations Act of 1947, 61 Stat. 140, adding §§ 8(b)(3) and 8(b)(4)(ii)(A), 29 U.S.C. §§ 158(b)(3), (b)(4)(ii)(A) (1959). Whether unfair labor practices were committed, however, must be considered in the first instance by the National Labor Relations Board on complaint of the General Counsel. The only question before us is whether the same practices also infringe the Sherman Act. We conclude that they do not. A labor union's refusal to deal has been held to be exempt in the absence of a conspiracy with businessmen. *Hunt* v. *Crum-*

boch, 325 U.S. 821 (1945). Moreover, the purpose behind the unions' action makes it apparent that there is no violation involved. Unlike *Hunt* v. *Crumboch, supra*, at 826, et sec. (dissenting opinions), refusal to bargain here is not aimed at eliminating a competitor from the product market, but rather at achieving uniformity of labor standards.

The exertion of pressure on orchestra leaders to join the union reflects a legitimate union concern for the closed shop and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members. See, *e.g., Los Angeles Meat & Provision Drivers* v. *United States, supra; United States* v. *Fish Smokers' Trade Council, Inc.*, 183 F. Supp.227 (S.D.N.Y. 1960). The same orchestra leaders who are "employers" in the club date field are very often "employees" when they perform as sidemen or sub-leaders or when in other fields the purchaser of music is actually the employer. Moreover, even those orchestra leaders who, as employers in club dates, lead but never perform as players, are proper subjects for membership because they are in job competition with union sub-leaders; each time a non-union orchestra leader performs, he displaces a "union job" with a "non-union job." *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc., supra.* Although there might be no such justification in the case of one who managed an orchestra but who never performed as a leader or player, we need not reach that question since Judge Levet found that no significant pressure to become members has been exerted by the union on Carroll and Peterson, the two plaintiffs who manage orchestras but do not perform.

Union by-laws prohibit the members from accepting engagements with or making any payments to caterers. Whether such a regulation is exempt from the Sherman Act may depend upon the effect on the terms and conditions of union members' employment of the bookings with, and kickbacks to, caterers. But the appellants have not

shown that they were injured by the regulation. There is nothing in the record which tends to establish that the appellants suffered a loss or reduction in engagements or that they were confined to less profitable contracts because of their inability to deal with caterers. The appellants, therefore, lack standing to challenge the lawfulness of the regulation. Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1959).[10]

The objection to the unions' regulation of booking agents fails for a like reason. Their proscription of booking agents who deal with non-union musicians is clearly exempt on the same ground as the maintenance of a closed shop. The unions, however, also establish ceilings on booking agents' commissions. These provisions might deny some orchestra leaders the opportunity to bid competitively for engagements offered by booking agents, but there is no proof that the appellants attempted to offer booking agents a higher commission or that they would do so if given the chance. Consequently they lack standing to raise this issue.

The judgment of the district court is affirmed except for the price-fixing charge. The case is remanded to the district court to fashion an order enjoining the unions from enforcing the price restrictions against the four appellants and for a determination of what damages, if any, they have suffered.

The resulting judgment should provide that no costs will be taxed against any of the parties.

FRIENDLY, Circuit Judge (concurring and dissenting):

Agreeing with so much of Judge Anderson's excellent opinion as affirms rulings of the District Court, I must dissent from the portion that reads for reversal I do this with hesitation since the line between those forms of union

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[10] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . ."

activity that are permissible and those that run afoul of the antitrust laws is anything but bright. In my view, however, the majority have failed to take adequate account of characteristics of the business here before us that render it *sui generis*, as Judge Levet with the years of experience gained from handling this and related actions, see fn. 1 to the majority opinion, has so thoroughly appreciated.

If club dates were always or almost always handled by non-performing leaders who devoted themselves exclusively or mainly to that activity, I would agree that fixing a minimum spread between the price paid by the buyer and the expenses incurred by the seller was not a "legitimate object" of union activity within the shelter of §§ 6 and 20 of the Clayton Act read in the light of § 4 of the Norris-LaGuardia Act. Such cases, however, are simply a rather small point at one end of a spectrum. Beginning with the single sideman "leading" himself, this ranges through the sideman who picks up two or three engagements a year as leader of a larger group, the performer who spends a fair portion of his time as a leader, the musician who does nothing but lead, and the exclusive leader having several bands with engagements at the same time,[1] up to the few "leaders" who have ceased to lead at all. Obviously this means a higher degree of interchangeability in work functions and competition among union members for posts as leaders.[2]

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[1] In all these categories the leader usually plays an insrtument at least part of the time when he is leading.

[2] An exhibit showed that for the period April 1-December 31, 1960, 6589 of Local 802's 30,000 members acted as leaders for club dates. A group of 118 leaders each had from 51 to more than 200 engagements, and a second group of 208 had from 21 to 50. On the other hand, 2789 acted as leader only once, 3062 from 2 to 9 times, and 608 from 10 to 20. Although appellants regard these figures as showing that the first two groups stand apart from the others, they seem to me to show the contrary.

The provisions my brothers condemn as offending the Sherman Act is that a leader must obtain an extra fee—25% of his scale when he leads himself, 50% when he leads another, 75% when he leads two others, and 100% when he leads three or more others — plus 8% of the aggregate scale wages to cover social security and unemployment insurance taxes and bookkeeping. Taking the first case first, I fail to see why protecting the member who wants to make an extra charge of 25% when he assumes the additional burden of getting an engagement against being undercut by others willing to forgo it is not as legitimate a union objective as setting a differential for a sideman's playing more than one instrument or engaging in rehearsal. As the size of the band increases, the time and cost of obtaining engagements, picking the sidemen, and making sure they are on hand at the appointed time and place also grow. If the union wants to see that such services are compensated rather than have some members perform them without remuneration for their time, effort or out-of-pocket expenses, this objective does not cease to be "intimately connected with wages, hours and working conditions" and thereby without the protection from the antitrust laws afforded by the Clayton Act, see Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676, 689-690, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) (White, J.), either because we have held the leader to be an "employer" within § 302 of the Labor Management Relations Act, Carroll v. American Federal of Musicians, 295 F.2d 484, 486 (2 Cir. 1961); Cutler v. American Federation of Musicians, 316 F.2d 546 (2 Cir.), cert. denied, 375 U.S. 941, 84 S.Ct. 346, 11 L.Ed.2d 272 (1963), or because the arrangements between the leader and the father of the bride are not themselves within the national labor policy. The fact that the leader is in part an entrepreneur does not deprive the union of a legitimate interest in his earnings up to the point where his services both as a performing artist and as a

salesman and manager have been adequately compensated. Whether Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co., supra, ultimately comes to mean that employer-union agreements on mandatory subjects of collective bargaining are generally or are always exempt from the antitrust laws, to read that case as establishing that only such union activities enjoy exemption would be a serious misunderstanding. Where, as here, the union rule merely sets a floor under the price at which one union member may sell his services to customers in competition with others, the union needs no such special justification as it did in *Jewel Tea* for regulating what would ordinarily be management prerogatives of independent businessmen employing union members. See Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 103 and 104-108, 83 S.Ct. 162, 9 L.Ed.2d 150 (concurring opinion of Mr. Justice Goldberg) (1962); cf. Local 24, Int'l Bhd. of Teamsters, etc. v. Oliver, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959). A different result might be warranted if the floor were set so high as to cover not merely compensation for the additional services rendered by a leader but entrepreneurial profit as well. But there has been no such showing here.

I would affirm the dismissal of the complaint.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of January one thousand nine hundred and sixty-seven.

PRESENT:

Hon. Henry J. Friendly,
Hon. J. Joseph Smith,
Hon. Robert P. Anderson,
Circuit Judges.

Docket No. 30445

JOSEPH CARROLL, CHARLES PETERSON, Orchestra Leaders of Greater New York, and CHARLES TURECANO, as Treasurer,
Plaintiffs-Appellants,

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, except as to determination of the issue of price fixing and as to that the judgment be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court.

/s/ A. DANIEL FUSARO
Clerk

[Identical judgment entered on January 30, 1967, in Docket No. 30446.]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL., *Petitioners,*

v.

JOSEPH CARROLL, ET AL.

Order Extending Time To File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioners,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 29th, 1967.

JOHN M. HARLAN, *Associate Justice of the Supreme Court of the United States.*

Dated this 26th day of April, 1967.

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1966

JOSEPH CARROLL, ET AL., *Petitioners,*

v.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL.

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Dated this 26th day of April, 1967.

SUPREME COURT OF THE UNITED STATES

Nos. 309 and 310, October Term, 1967

[Titles omitted]

Order Allowing Certiorari—October 9, 1967

The petitions for writs of certiorari are granted. The cases are consolidated and two hours are allotted for oral argument. The Chief Justice and Mr. Justice Marshall took no part in the consideration or decision of these petitions.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petitions shall be treated as though filed in response to such writs.